# CERTIFICATE

## Supreme Court of the United States

OCTOBER TERM, 1937

No. 600

FRANK NIGRO

vs.

THE UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED OCTOBER 11, 1937

(33,052)

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INDEX


| | Original | Print |
|---|---|---|
| Certificate from the United States circuit court of appeals, eighth circuit | 1 | 1 |
| Statement of case | 1 | 1 |
| Questions certified | 6 | 5 |
| Judges' signatures | 6 | 6 |
| Clerk's certificate (omitted in printing) | 7 | |


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[fol. 1]

# IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

SEPTEMBER TERM, A. D. 1927

No. 7796

FRANK NIGRO, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error

In Error to the District Court of the United States for the Western District of Missouri

Mr. W. G. Lynch (Mr. Harvey Roney was with him on the brief), for plaintiff in error.

Mr. Harry L. Thomas, Assistant United States Attorney (Mr. Roscoe C. Patterson, United States Attorney, and Mr. William L. Vandeventer, Assistant United States Attorney, were with him on the brief), for defendant in error.

Before Sanborn and Booth, Circuit Judges, and Phillips, District Judge

## STATEMENT OF CASE

The United States Circuit of Appeals for the Eighth Circuit hereby certifies that a record on a writ of error now pending before it discloses the following:

Frank Nigro and Roy Williams were indicted in the United States District Court for the Western District of Missouri for violation of the Harrison Anti-Narcotic Act (Act of December 17, 1914, 38 St. 785, amended February 24, 1919, 40 St. 1130, re-enacted November 23, 1921, 42 St. 298, and re-enacted June 2, 1924, 43 St. 328; U. S. C. Tit. 26, Secs. 211, 692, 696, 700). There were two counts in the indictment.

The charging part of the first count, evidently under Section 8 of the Act, read as follows:

"that * * * one Frank Nigro and one Roy Williams being then and there dealers in opium and its derivatives,

[fol. 2] and being persons required by the laws of the United States to register as such dealers in the Sixth Internal Revenue Collection District of Missouri, did then and there unlawfully, wilfully, knowingly and feloniously, and in violation of an Act of Congress of December 17, 1914, as amended, possess for sale and distribution, a certain quantity of a derivative of opium, to-wit, one ounce of morphine, without having registered as dealers in such derivatives of opium their names or styles and places of business with said Collector of Internal Revenue of the United States for the Sixth Internal Revenue Collection District of Missouri, and without having paid to said Collector the special tax as such dealers in said derivatives of opium as required by the laws of the United States of America * * *."

The charging part of the second count, evidently under Section 2 of the Act, read as follows:

"that * * * one Frank Nigro and one Roy Williams did unlawfully, wilfully, knowingly and feloniously sell to a certain person, to-wit, to one A. L. Raithel a certain quantity of a derivative of opium, to-wit, one ounce of morphine, the said derivative of opium so sold as aforesaid, not being then and there sold in pursuance of a written order of the said A. L. Raithel on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States * * *."

Roy Williams was not apprehended. Frank Nigro, hereafter called defendant, was tried and convicted on both counts. Sentence was imposed of five years in the Penitentiary at Leavenworth on each count, the sentences on the two counts to run concurrently.

If the sentence on either count was proper, the judgment must be affirmed; but in view of our decisions in O'Neill vs. United States, 19 F. (2d) 322, and Butler vs. United States, 20 F. (2d) we have felt constrained to hold certain rulings and charges of the trial court erroneous, and to reverse the judgement so far as it relates to count one. This leaves the judgment grounded on the second count alone.

We are of opinion that the case cannot properly be disposed of without determining the construction, and pos-

sibly the constitutionality, of the first provision of Section 2 of the Act, reading as follows:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commis-
[fol. 3] sioner of Internal Revenue."

For the purpose of certification, we state the facts as follows, and we have regarded as facts whatever the evidence fairly tended to show in aid of the prosecution:

About 5 P. M. February 23, 1926, Raithel, a United States narcotic agent, and Knudtson, an addict informer, visited a barber shop at 311 E. 6th Street, Kansas City, Missouri. Raithel remained in the front part of the shop while Knudtson went to the back part, where he had a talk with defendant. After a few minutes Raithel and Knudtson left. About 7 P. M. they returned. Defendant was there. Knudtson introduced Raithel to defendant. Knudtson then said to defendant, "How's everything?" Defendant, said, "All right." Knudtson said, "Well, can we get an ounce of M?" Defendant called out, "Roy"; and a negro boy came up. Defendant then said "It will cost you $70. Give me the money and I will go with him, go with this boy and see that you get a full ounce, or that you get a square deal." Knudtson produced $50, which he handed to Raithel. Raithel produce $20; and handed the $70 to defendant. Defendant said, "I will go with him [the boy] to see that it is all right and if it isn't I will give you your money back." Defendant and the boy left the building. Raithel and Knudtson remained. After a short time, defendant and the boy returned; the boy passed Raithel and Knudtson and went down into the basement of the building. Knudtson followed the boy. Defendant said to Raithel, "Go on, look it over; I want you to see that it is all right." Raithel then went to the basement. The boy produced from his clothing an ounce can of morphine, and said, "Look it over." Raithel and Knudtson examined it, and Raithel put in his pocket. The boy said, "Any time you want anything, just come down." Raithel said, "Who will we ask for?" The boy said, "Roy." Raithel said, "Roy
[fol. 4] who?" The boy said, "Oh, Williams will do."

Raithel and Knudtson said, "All right"; and all three went upstairs from the basement. Defendant was standing by the stove. He said, "How's everything?" Raithel and Knudtson said "All right." Defendant said, "All right, come back any time." Raithel and Knudtson left.

Neither Knudtson nor defendant testified, and the negro boy was not produced.

There was no allegation in the count under discussion that defendant was a dealer as defined in the act; no allegation that defendant was one of the class of persons enumerated in Section 1 of the Act who are required to register and pay the tax. There was no evidence touching these matters. There was no direct testimony that a form order signed by the purchaser was not given to defendant. There was no allegation in the count whether or not the sale was made in or from an original stamped package, and there was no evidence touching this matter.

Defendant by demurrer challenged the sufficiency of the count for the lack of such allegations; and at the close of the case moved for a directed verdict on the ground that the evidence wholly failed to show the commission of any offense.

The contention of the Government in brief is, that the words "any person" occurring in the first sentence of Section 2 are to be construed broadly, so as to include all persons within the United States. It is pointed out that such was the construction given to the words "any person" in the clause of Section 1 reading:

"It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package",

in the case of United States vs. Wong Sing, 260 U. S. 18.

[fol. 5] The contention of the defendant is that Section 2 was part of the original act of December 17, 1914 (38 St. 785); that the persons intended to be dealt with by the act are a limited class, as shown by the title of the original act and by Section 1 thereof; that Section 2 merely consisted of regulatory provisions touching the persons required by Section 1 to register and pay the tax; that this is shown by the provision found later on in Section 2 reading as follows:

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district."

Defendant further contends that the requirement of Section 2 relative to the use of the prescribed form order was intended to apply only to transactions in which both the parties were of the class required to register and pay the tax, or to transactions in which at least one of the parties, the seller, was of that class; that Section 2 stands on a parity with Section 8, and that the words "any person" in the first sentence of Section 2 should receive the same limited construction as was given to the same words in Section 8 in United States vs. Jin Fuey Moy, 241 U. S. 394; that the distinction in construction between the Act of 1914 and the Act of 1919 was pointed out in the Wong Sing case.

This court, being in doubt, desires the instruction of the Supreme Court upon the following questions, a decision of which is deemed indispensable to a determination of this case now before it, and to a proper discharge of its duties herein:

QUESTIONS CERTIFIED

Question I

[fol. 6] Is the provision which is contained in the first sentence of Section 2 of the Act limited in its application to those persons who by Section 1 are required to register and pay the tax?

Question II

If a broader construction is given to said provision, is the provision as so construed, constitutional?

If question I is answered in the affirmative, then we ask

Question III

Is it necessary for the Government in prosecuting under said provision, to allege and prove that defendant was a person required by Section 1 to register and pay the tax?

If question III is answered in the affirmative then we ask

Question IV

Is the allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, sufficient to charge that defendant was a person required to be registered and to pay the tax under Section 1?

Walter H. Sanborn, United States Circuit Judge.
Wilbur B. Booth, United States Circuit Judge.
Orie L. Phillips, United States District Judge, the Judges who sat in the Circuit Court of Appeals on the hearings of the case.

[fol. 7] Clerk's certificate to foregoing omitted in printing.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. No. 7796. Frank Nigro, Plaintiff in Error, vs. United States of America. Certificate of Questions to Supreme Court of the United States.

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Endorsed on cover: File No. 33,052. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 600. Frank Nigro, vs. The United States of America. On certificate. Filed October 31st, 1927. File No. 33,052.

## INDEX.


| | Pages |
|---|---|
| Opinion. . . | 1 |
| Jurisdiction. . . | 2 |
| Certified Statement of Circuit Court of Appeals | 2-7 |
| Questions Certified. . . | 8 |
| Question I and Argument | 9-50 |
| Question II and Argument | 51-63 |
| Question III and Argument | 64-78 |
| Question IV and Argument | 79-90 |


### STATUTES


| | |
|---|---|
| Title, Act December 17, 1914 | 10 |
| Section 1, Act December 17, 1914 | 10-11 |
| Section 2, Act December 17, 1914 | 13-16 |
| Section 3, Act December 17, 1914 | 30 |
| Section 5, Act December 17, 1914 | 30-31 |
| Section 4, Act December 17, 1914 | 34 |
| Section 1, As Amended February 24, 1919 | 42-47 |


### CONSTITUTION


| | |
|---|---|
| Article 1. . . | 9 |
| Article 10 of Amendments | 10 |

## CASES CITED


| | Pages |
|---|---|
| U. S. v. Jin Fuey Moy | 9, 16, 52, 57, 71 |
| U. S. v. Doremus | 9, 36, 54 |
| U. S. v. Wiltberger | 17 |
| U. S. v. Kirby | 18 |
| Church of the Holy Trinity v. U. S. | 19, 27 |
| Pennington v. Coxe | 24 |
| U. S. v. Fisher | 25 |
| U. S. v. Freeman | 25 |
| Child Labor Tax Case | 38, 59 |
| Hughes v. U. S. | 39 |
| U. S. v. Balint | 40 |
| U. S. v. Wong Sing | 40, 49, 54 |
| U. S. v. Rosenberg | 41 |
| Oakshette v. U. S. | 41 |
| Weaver v. U. S. | 46, 51 |
| Martin v. U. S. | 48 |
| O'Neill v. U. S. | 48, 51, 76 |
| Butler v. U. S. | 48, 51, 75 |
| Bellomini v. U. S. | 49 |
| U. S. v. Daugherty | 58 |
| Hammer v. Dagenhart | 58 |
| Hill v. Wallace | 61 |
| Linder v. U. S. | 61 |
| U. S. v. One Ford Coupe | 62 |
| U. S. v. Evans | 65, 87 |
| U. S. v. Cook | 66 |
| U. S. v. Hess | 67, 87 |
| U. S. v. Cruikshank | 68, 86 |
| U. S. v. Reese | 69, 84 |
| U. S. v. Mann | 70, 81 |
| U. S. v. Carll | 70, 82, 83 |
| Corpus Juris | 72, 73, 74 |
| Agnew v. U. S. | 73 |
| Davis v. U. S. | 74 |
| U. S. v. Lacher | 80 |
| Todd v. U. S. | 80 |
| U. S. v. Gooding | 81 |
| U. S. v. Simmons | 85 |
| Pettibone v. U. S. | 88 |
| U. S. v. Britton | 88 |
| Fontana v. U. S. | 88, 89 |

# In the Supreme Court of the United States

OCTOBER TERM, 1927

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FRANK NIGRO

v.

THE UNITED STATES OF AMERICA

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*On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit*

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## BRIEF FOR PLAINTIFF IN ERROR, FRANK NIGRO

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No. 600

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### OPINION BELOW

As the Circuit Court of Appeals certified the case it rendered no opinion and the District Court did not have occasion to do so.

## JURISDICTION

This case came here originally on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

The statement of the case as certified by the Circuit Court of Appeals for the Eighth Circuit is as follows:

"The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on a writ of error now pending before it discloses the following:"

"Frank Nigro and Roy Williams were indicted in the United States District Court for the Western District of Missouri for violation of the Harrison Anti-Narcotic Act (Act of December 17, 1914, 38 St. 785, amended February 24, 1919, 40 St. 1130, re-enacted November 23, 1921, 42 St. 298, and re-enacted June 2, 1924, 43 St. 328; U. S. C. Tit. 26, Secs. 211, 692, 696, 700). There were two counts in the indictment."

"The charging part of the first count, evidently under Section 8 of the Act, read as follows:"

"that * * * one Frank Nigro and one Roy Williams being then and there dealers in opium and its derivatives, and being persons required by the laws of the United States to register as such dealers in the Sixth Internal Revenue Collection District of Missouri, did then and there unlawfully, wilfully, knowingly and feloniously, and in violation of an Act of Congress of December 17, 1914, as amended, possess for sale and distribution, a certain quantity of a derivative of opium, to-wit, one ounce of morphine, without having registered as dealers in such derivatives of opium their names or styles and places of business with said Collector of Internal Revenue of the United States for the Sixth Internal Revenue Collection District of Missouri, and with-

out having paid to said Collector the special tax as such dealers in said derivatives of opium as required by the laws of the United States of America * * *."

"The charging part of the second count, evidently under Section 2 of the Act, read as follows:"
"that * * * one Frank Nigro and one Roy Williams did unlawfully, wilfully, knowingly and feloniously sell to a certain person, to-wit, to one A. L. Raithel a certain quantity of a derivative of opium, to-wit, one ounce of morphine, the said derivative of opium so sold as aforesaid, not being then and there sold in pursuance of a written order of the said A. L. Raithel on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States * * *."

"Roy Williams was not apprehended. Frank Nigro, hereafter called defendant, was tried and convicted on both counts. Sentence was imposed of five years in the penitentiary at Leavenworth on each count, the sentences on the two counts to run concurrently."

"If the sentence on either count was proper, the judgment must be affirmed; but in view of our decisions in *O'Neil* v. *United States*, 19 F. (2d) 322 and *Butler* v. *United States*, 20 F. (2d) —, we have felt constrained to hold certain rulings and charges of the trial court erroneous, and to reverse the judgment so far as it relates to count one. This leaves the judgment grounded on the second count alone."

"We are of opinion that the case cannot properly be disposed of without determining the construction, and possibly the constitutionality, of the first provision of Section 2 of the Act, reading as follows:"

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid

drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

"For the purpose of certification, we state the facts as follows, and we have regarded as facts whatever the evidence fairly tended to show in aid of the prosecution:"

"About 5 p. m. February 23, 1926, Raithel, a United States narcotic agent, and Knudtson, an addict informer, visited a barber shop at 311 E. 6th Street, Kansas City, Missouri. Raithel remained in the front part of the shop while Knudtson went to the back part, where he had a talk with defendant. After a few minutes Raithel and Knudtson left. About 7 p. m. they returned. Defendant was there. Knudtson introduced Raithel to defendant. Knudtson then said to defendant, 'How's everything?' Defendant said, 'All right.' Knudtson said, 'Well, can we get an ounce of M?' Defendant called out, 'Roy,' and a negro boy came up. Defendant then said, 'It will cost you $70. Give me the money and I will go with him, go with this boy and see that you get a full ounce, or that you get a square deal.' Knudtson produced $50, which he handed to Raithel. Raithel produced $20; and handed the $70 to defendant. Defendant said, 'I will go with him (the boy) to see that it is all right and if it isn't I will give you your money back.' Defendant and the boy left the building. Raithel and Knudtson remained. After a short time, defendant and the boy returned; the boy passed Raithel and Knudtson and went down into the basement of the building. Knudtson followed the boy. Defendant said to Raithel, 'Go, look it over; I want you to see that it is all right.' Raithel then went to the basement. The boy produced from his cloth-

ing an ounce can of morphine, and said, 'Look it over.' Raithel and Knudtson examined it, and Raithel put it in his pocket. The boy said, 'Any time you want anything, just come down.' Raithel said, 'Who will we ask for?' The boy said, 'Roy.' Raithel said, 'Roy who?' The boy said, 'Oh, Williams will do.' Raithel and Knudtson said, 'All right,' and all three went upstairs from the basement. Defendant was standing by the stove. He said, 'How's everything?' Raithel and Knudtson said, 'All right.' Defendant said, 'All right, come back any time.' Raithel and Knudtson left."

"Neither Knudtson nor defendant testified, and the negro boy was not produced."

"There was no allegation in the count under discussion that defendant was a dealer as defined in the Act; no allegation that defendant was one of the class of persons enumerated in Section 1 of the Act who are required to register and pay the tax. There was no evidence touching these matters. There was no direct testimony that a form order signed by the purchaser was not given to defendant. There was no allegation in the count whether or not the sale was made in or from an original stamped package, and there was no evidence touching this matter."

"Defendant by demurrer challenged the sufficiency of the count for the lack of such allegations; and at the close of the case moved for a directed verdict on the ground that the evidence wholly failed to show the commission of any offense."

"The contention of the Government in brief is, that the words 'any person' occurring in the first sentence of Section 2 are to be construed broadly, so as to include all persons within the United States. It is pointed out that such was the construction given to the words 'any person' in the clause of Section 1 reading:"

" 'It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package,' in the case of *United States* v. *Wong Sing*, 260 U. S. 18."

"The contention of the defendant is that Section 2 was part of the original Act of December 17, 1914 (38 St. 785); that the persons intended to be dealt with by the Act are a limited class, as shown by the title of the original Act and by Section 1 thereof; that Section 2 merely consisted of regulatory provisions touching the persons required by Section 1 to register and pay the tax; that this is shown by the provision found later on in Section 2 reading as follows:"

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district."

"Defendant further contends that the requirement of Section 2 relative to the use of the prescribed form order was intended to apply only to transactions in which both the parties were of the class required to register and pay the tax, or to transactions in which at least one of the parties, the seller, was of that class; that Section 2 stands on a parity with Section 8, and that the words 'any person' in the first sentence of Section 2 should

receive the same limited construction as was given to the same words in Section 8 in *United States* v. *Jin Fuey Moy,* 241 U. S. 394; that the distinction in construction between the Act of 1914 and the Act of 1919 was pointed out in the Wong Sing case."

"This court, being in doubt, desires the instruction of the Supreme Court upon the following questions, a decision of which is deemed indispensable to a determination of this case now before it, and to a proper discharge of its duties herein:"

## QUESTIONS CERTIFIED

### QUESTION I

"Is the provision which is contained in the first sentence of Section 2 of the Act limited in its application to those persons who by Section 1 are required to register and pay the tax?"

### QUESTION II

"If a broader construction is given to said provision, is the provision as so construed, constitutional?"

"If question I is answered in the affirmative, then we ask"

### QUESTION III

"Is it necessary for the Government in prosecuting under said provision, to allege and prove that defendant was a person required by Section 1 to register and pay the tax?"

"If question III is answered in the affirmative, then we ask"

### QUESTION IV

"Is the allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, sufficient to charge that defendant was a person required to be registered and to pay the tax under Section 1?"

## Question 1

"Is the provision which is contained in the first sentence of Section 2 of the Act limited in its application to those persons who by Section 1 are required to register and pay the tax?"

ARGUMENT

To answer this question a general survey of the law becomes necessary. The Harrison Narcotic Act, to have any legal efficacy, must be construed as a revenue measure. Mr. Justice Holmes in speaking for this court said in the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right."

Its constitutional basis must be found in paragraph one of Section 8 of Article 1 of the Constitution of the United States:

> "The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

*United States* v. *Doremus*, 249 U. S. 86.

Without such constitutional basis it would violate Article 10 of the Amendments to the Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The method which Congress adopted to raise revenue by means of this Act, as originally passed, is disclosed by its title, and prescribed by Section 1 of the Act. The title reads as follows:

> "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives or preparations, and for other purposes."
>
> 38 Stat. 785.

The first paragraph of Section 1, as originally passed, among other things, provided:

> "On and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: Provided, That the office, or if none, then the residence of any person shall be considered for the purpose of this Act to

be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of $1 per annum."

The second paragraph of Section 1 of this Act, as originally passed, provided:

> "It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section."

The fourth or last paragraph of Section 1 as originally passed provided:

> "That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect."

If Congress had enacted nothing more than Section 1, it would have been lawful for every person, "who registered and paid the special tax," subject, of course, to the rules and regulations made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, or their derivatives. The law required every person who did any of those things in relation to the drugs mentioned, to register and pay

the special tax, and it would have been unlawful for any person so required to register to produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away any of the aforesaid drugs without having registered and paid the special tax provided for in that section. It is thus seen that Section 1 of the Act, broadly speaking, divides persons, who deal in any way in the narcotic drugs, into two classes, namely, registered and unregistered persons, and in the nature of things, there could not be, broadly speaking, any other class that Congress could deal with. The penal provision of Section 1 deals exclusively with unregistered persons, and the crime which it denounces contains certain distinct and essential elements, which are not found in any other provision of the law. Confining these elements to a sale, they are (1) a sale of a narcotic drug (2) by a person required to register and (3) without having registered and paid the special tax. It was evidently the purpose of Congress in passing this penal provision, in connection with Section 9, which fixes the punishment, to define a crime leveled against unregistered persons, who did any of the things in relation to the drugs, without registering as required by the first paragraph of Section 1.

Congress in the penal provision of Section 1, as originally passed, covered the class of unregistered persons entirely and completely, and there remained but one other class for Congress to deal with in the subsequent sections of the Act, namely, registered persons. No doubt, Congress had a plan or system in mind in passing the law, and that plan or system covered two classes of persons, registered and unregistered, and having fully covered the unregistered class in the penal provision of Section 1, it can scarcely be supposed that Congress would undertake to deal with the same class

again, for precisely the same act, or confuse or mingle the classes in other penal provisions. The penal provision of Section 1 necessarily excluded unregistered persons from any of the later sections or provisions of the Act, for such persons were absolutely prohibited from producing, importing, manufacturing, compounding, dealing in, dispensing, selling, distributing or giving away opium or coca leaves, or their derivatives, under any and all circumstances. As the prohibition of this penal provision was all-inclusive, no need could possibly exist for Congress to deal with the same class again. If Congress had a plan or system in mind in enacting this law, it must be assumed that having covered the class of unregistered persons entirely, that when it proceeded to the enactment of other sections, it undertook to deal with the only class remaining, namely, that of registered persons. If that is true, then Section 2 of the Act could only deal with registered persons, and it is respectfully contended that the whole tenor of that section shows that such was the evident intent and purpose of Congress in passing it.

It may be remarked at this place that Section 2 of the Act has never been altered or amended since it was originally passed. The parts of Section 2 which have any bearing upon the question provide:

> "It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by

any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: Provided, however, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall

have issued the same: And provided further, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

(c) To the sale, exportation, shipment, or delivery of any of the aforesaid drugs by any person within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial, district, county, or municipal or insular hospitals or prisons.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue,

> with the approval of the Secretary of the Treasury, but shall not exceed the sum of $1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

It must be admitted that the words "any person," used in the first sentence of the first paragraph of Section 2, are rather broad, but no broader than the same words in Section 8 of the Act. However, this Court in the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402, by comparing the several parts of the Act and making deductions therefrom, reached the conclusion that the words "any person" in Section 8 did not include all persons, but only those who are required to register and pay the special tax, as provided by Section 1 of the Act. This Court said:

> "Approaching the issue from this point of view we conclude that 'any person not registered' in Section 8 cannot be taken to mean any person in the United States, but must be taken to refer to the

class with which the statute undertakes to deal—the persons who are required to register by Section 1. It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument, taken by itself, for a broader meaning. But every question of construction is unique, and an argument that would prevail in one case may be inadequate in another. This exemption stands alongside of one that saves employees of registered persons, as to Sections 1 and 4, and nurses under the supervision of a physician, etc., as does Section 4, and is so far vague that it may have had in mind other persons carrying out a doctor's orders rather than the patient's. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of, the proviso is not enough to overcome the dominant considerations that prevail in our mind."

The Jin Fuey Moy case is not the first time that this Court has dealt with the words "any person." This Court in the case of *United States* v. *Wiltberger*, 5 Wheaton, 76, 96, said:

"The first section defines the crime of treason, and declares, 'that if any person or persons owing allegiance to the United States of America shall levy war,' etc., 'such person or persons shall be adjudged guilty of treason,' etc. The second section defines misprision of treason; and in the description of the persons who may commit it, omits the words 'owing allegiance to the United States,' and uses without limitation, the general terms 'any person or persons.' Yet, it has been said, these general terms were obviously intended to be limited, and must be limited, by the words 'owing allegiance to the United States,' which are used in the preceding section.

> It is admitted that the general terms of the second section must be so limited; but it is not admitted that the inference drawn from this circumstance, in favor of incorporating the words of one section of this act into another, is a fair one. Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary. The words, therefore, 'owing allegiance to the United States,' in the first section, are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same were they omitted. When, therefore, we give the same construction to the second section, we do not carry those words into it, but construe it as it would be construed independent of the first. There is, too, in a penal statute, a difference between restraining general words and enlarging particular words."

In the case of *United States* v. *Kirby*, 7 Wall. 74 U. S. 483, 484, 486, 482, this Court was dealing with a statute which provided:

> "If any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction for every such offense, pay a fine not exceeding $100; and if any ferryman shall, by wilful negligence or refusal to transport the mail across the ferry, delay the same, he shall forfeit and pay for every ten minutes that the same shall be so delayed, a sum not exceeding $10."

The defendant was a sheriff and arrested a mail carrier, and this court, holding that the law did not cover him, said:

> "All laws should receive a sensible construction. General terms should be so limited in their application

as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'That whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction of retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

In the case of *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 458, 459, 460, 461, this court said:

"Plaintiff in error is a corporation, duly organized and incorporated as a religious society, under the laws of the State of New York. E. Walpole Warren was, prior to September, 1887, an alien residing in England. In that month the plaintiff in error made a contract with him, by which he was to remove to the City of New York, and enter into its service as rector and pastor; and, in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States

that this contract on the part of the plaintiff in error was forbidden by Chapter 164, 23 Stat. at L. 332, and an action was commenced to recover the penalty prescribed by that Act. The Circuit Court held that the contract was within the prohibition of the statute, and rendered judgment accordingly (36 Fed. Rep. 303); and the single question presented for our determination is whether it erred in that conclusion.

The first section describes the Act forbidden, and is in these words:

'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories or the District of Columbia.'

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind;' and further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force in this reasoning we cannot think Con-

gress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances.'

In *Margate Pier Co.* v. *Hannam*, 3 Barn. & Ald. 266, C. J. Abbott quotes from Lord Coke as follows: 'Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endangered.' In the case of the *State* v. *Clark*, 29 N. J. L. 96, 99, it appeared that an Act had been passed making it a

misdemeanor to willfully break down a fence in the possession of another person. Clark was indicted under that statute. The defense was that the act of breaking down the fence, though willful, was in the exercise of a legal right to go upon his own lands. The trial court rejected the testimony offered to sustain the defense, and the Supreme Court held that this ruling was error. In its opinion the court used this language: 'The Act of 1855, in terms, makes the willful opening, breaking down or injuring of any fences belonging to or in the possession of any other person a misdemeanor. In what sense is the term willful used? In common parlance, willful is used in the sense of intentional as distinguished from accidental or involuntary. Whatever one does intentionally he does willfully. Is it used in that sense in this Act? Did the Legislature intend to make the intentional opening of a fence for the purpose of going upon the land of another indictable if done by permission or for a lawful purpose? * * * We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. The language of the Act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the Act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed.' In *United States* v. *Kirby*, 74 U. S. 7 Wall. 482, 486 (19:278, 280), the defendants were indicted for the violation of an Act of Congress providing 'that if any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall upon conviction for every such offense pay a fine not exceeding one hundred dollars.' The specific charge was that the defendants knowingly and willfully retarded the passage of one Farris,

a carrier of the mail, while engaged in the performance of his duty, and also in like manner retarded the steamboat General Buell, at that time engaged in carrying the mail. To this indictment the defendants pleaded specially that Farris had been indicted for murder by a court of competent authority in Kentucky; that a bench warrant had been issued and placed in the hands of the defendant Kirby, the sheriff of the county, commanding him to arrest Farris and bring him before the court to answer to the indictment; and that in obedience to this warrant, he and the other defendants, as his posse, entered upon the steamboat General Buell and arrested Farris, and used only such force as was necessary to accomplish that arrest. The question as to the sufficiency of this plea was certified to this court, and it was held that the arrest of Farris upon the warrant from the state court was not an obstruction of the mail, or the retarding of the passage of a carrier of the mail, within the meaning of the Act. In its opinion the court says: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, for he is not to be hanged because he would not stay to be burnt.'

> And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.' The following cases may also be cited: *Henry* v. *Tilson*, 17 Vt. 479; *Rycgate* v. *Wardsboro*, 30 Vt. 746; *Ex parte Ellis*, 11 Cal. 222; *Ingraham* v. *Speed*, 30 Miss 410; *Jackson* v. *Collins*, 3 Cow. 89; *People* v. *Utica Ins. Co.*, 15 Johns. 358; *Burch* v. *Newbury*, 10 N. Y. 374; *People* v. *New York*, 95 N. Y. 554, 558; *People* v. *Lacombe*, 99 N. Y. 43, 49; *Chesapeake & O. Canal Co.* v. *Baltimore & O. R. Co.*, 4 Gill & J. 152; *Osgood* v. *Breed*, 12 Mass. 525, 530; *Wilbur* v. *Crane*, 13 Pick. 284; *Oates* v. *First Nat. Bank of Montgomery*, 100 U. S. 239 (25:580)."

In the case of *State* v. *Gardner*, 174 Ia. 748, the decisions of the courts of several states are extensively reviewed, in which it is shown that the words "any person" are not all-inclusive and are limited in their application to those whom the Legislature had in mind. It is a fundamental rule of judicial construction that the legislative intent must be gathered from the whole body of the Act, and the general words may be restrained by a comparison of its parts.

This court in *Pennington* v. *Coxe*, 2 Cranch 33, 52, said:

> "That a law is the best expositor of itself; that every part of an Act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same Act, are among those plain rules laid down by common sense for the

exposition of statutes which have been uniformly acknowledged."

In the case of *United States* v. *Fisher et al.*, 2 Cranch. 358, 385, this court said:

> "That these words, taken in their natural and usual sense, would embrace the case before the court, seems not to be controverted. 'Any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise,' is a description of persons, which, if neither explained nor restricted by other words or circumstances, would comprehend every debtor of the public, however his debt might have been contracted.
>
> But other parts of the Act involve this question in much embarrassment.
>
> It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.
>
> On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself."

In the case of *United States* v. *Freeman*, 3 Howard 556, 565, Mr. Justice Wayne, speaking for this court, said:

> "Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words. (*Wimbish* v. *Tailbois*, Plowd. 57.) A

thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter. (*Zouch* v. *Stowell*, Plowd. 366.) These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason. This court has repeatedly, in effect, acted upon the rule, and there may be found, the reports of its decisions, cases under it, like the cases which have been cited from the reports of the English courts. In 4 Dall. 14, 'The intention of the legislature, when discovered, must prevail, any rule of construction declared by previous Acts to the contrary notwithstanding.' In 2 Cranch. 33, 'A law is the best expositor of itself—that every part of an Act is to be taken into view for the purpose of discovering the mind of the Legislature,' &c., &c. In the case of *The United States* v. *Fisher et al., Assignees of Blight*, in the same book, the court said, 'It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the Legislature to be extracted from the whole,' &c. In 2 Peters 662, 'A legislative Act is to be interpreted according to the intention of the Legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature.' In Paine's C. C. Rep. 11, 'In doubtful cases, a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the Legislature.' So in 1 Brockenb., C. C. Rep. 162. In the construction of statutes, one part must be

construed by another. In order to test the legislative intention, the whole statute must be inspected."

The title of the Act of December 17, 1914, of which Section 2 was a part, shows that the persons to be dealt with by the Act are a limited class, and that class, insofar as unregistered persons are concerned, was fully covered by the first section of the Act.

In the case of *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 462, this Court said:

> "Among other things which may be considered in determining the intent of the Legislature is the title of the Act. We do not mean that it may be used to add to or take from the body of the statute (*Hadden* v. *Barney*, 72 U. S. 3 Wall. 107 (18:518), but it may help to interpret its meaning. In the case of *United States* v. *Fisher*, 6 U. S. 2 Cranch. 358, 386 (2:304, 313), Chief Justice Marshall said: 'On the influence of which the title ought to have in construing the enacting clauses much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an Act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.' And in the case of *United States* v. *Palmer*, 16 U. S. 3 Wheat. 610, 631 (4:471, 477), the same judge applied the doctrine in this way: 'The words of the section are in terms of unlimited extent. The words "any person or persons" are broad enough to comprehend every human being. But general words

must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the Legislature intended to apply them. Did the Legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas? The title of an Act cannot control its words, but may furnish some aid in showing what was in the mind of the Legislature. The title of this Act is, "An Act for the Punishment of Certain Crimes against the United States." It would seem that offenses against the United States, not offenses against the human race, were the crimes which the Legislature intended by this law to punish.'

It will be seen that words as general as those used in the first section of this Act were by that decision limited, and the intent of Congress with respect to the Act was gathered partially, at least, from its title. Now, the title of this Act is, 'An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories and the District of Columbia.' Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors."

Section 2 of the Act of December 17, 1914, bears internal evidence that the crime which it denounces is confined to persons who have registered and paid the special tax. What possible purpose could Congress have in connecting an unregistered person with a written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue, when an unregistered person could not sell the drugs on any such order, or in any other way? Congress certainly could not have it in mind that a drug peddler, for instance, could sell the drugs upon such a written order, and it can hardly be conceived that Congress thought an unregistered person would sell to a registered person, who was obliged by the law to make a duplicate of such written order on a form issued in blank for that purpose, and keep the same for a period of two years open to the inspection of Government, state, territorial, district, municipal and insular officials. It must be conceded that the purchaser which Congress had in mind in enacting Section 2 would be a registered person, for no one other than a registered person could obtain such forms from the Collector of Internal Revenue.

> "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively, and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district."

The words "for the purposes above mentioned" evidently refer not only to the buyer, but to the seller as well, and to all the previous provisions in Section 2. The very next section, Section 3, provides:

> "Any person who shall be registered in any internal revenue district under the provisions of section one of this Act shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received."

It is inconceivable that Congress had in mind unregistered persons in the first sentence of Section 2, when such unregistered persons would know, or at least be presumed to know, that the persons to whom they sold the drugs would be required by the Collector of their district to make the statement, verified by affidavit, required by Section 3, setting forth the name of the person or persons from whom they had received the drugs, and the amount received from each person.

Section 5 of the Act provides:

> "The duplicate-order forms and the prescriptions required to be preserved under the provisions of section two of this Act, and the statements or returns filed in the office of the collector of the district, under the provisions of section three of this Act, shall be open to inspection by officers, agents and

> employees of the Treasury Department duly authorized for that purpose; and such officials of any state or territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs," etc.

Again it may be asked, can it be conceived that Congress could think that an unregistered person, who had no authority whatever to sell the drugs, would engage in a transaction with a registered person, who kept such paper evidences of the transaction for a period of two years, which all the officers mentioned in Section 5 could inspect, and thereby learn of his illicit transaction in the drugs?

In the very same paragraph of Section 2 and in the very next sentence it is provided:

> "Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the state, territorial, district, municipal and insular officials named in section five of this Act."

It would certainly be illogical and unnecessary for Congress to link up an unregistered person with a written order, but there would be a real and substantial reason to connect a registered person with such evidence of the

transaction. In making it unlawful for any person to sell, barter, exchange or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, it is manifest that Congress was dealing exclusively with registered persons, and prescribing the method by which such persons could sell the drugs, and penalized them if they departed from the method prescribed. Congress could not be guilty of the absurdity of expecting an unregistered person to preserve the evidences of his crime for a period of two years, open to the inspection of the officers designated. Not only does the first paragraph of Section 2 deal with registered persons, but the exceptions thereto apply to the same class. Nothing contained in this section shall apply—

> "(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist or veterinary surgeon registered under this Act, etc.
>
> (b) To the sale, dispensing or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist or veterinary surgeon registered under this Act," etc.

While subdivision (b) does not say anything about the dealer being registered, certainly this court would hold that Congress had in mind only a dealer who had registered and paid the special tax. It would be unthinkable that Congress would in Section 1 absolutely prohibit an unregistered person from selling in any way, and then permit an unregistered dealer to sell to a con-

sumer under and in pursuance of a written prescription issued by a physician, registered under the law. A sensible construction would necessarily hold that the dealer which Congress had in mind in subdivision (b) was a registered dealer. But there is no more reason to hold that Congress had such a dealer in mind than there is that the persons mentioned in the first sentence of paragraph two were registered under the Act. If Section 2 refers to all persons, and the dealer mentioned in subdivision (b) means any dealer registered or unregistered, then the law would be inconsistent, and dealers would be excluded from its operation entirely.

Subdivision (c) provides:

> "To the sale, exportation, shipment or delivery of any of the aforesaid drugs by any person within the United States or any territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States."

Do the words "any person," used in this subdivision, mean any person in the United States, or is it not confined to persons who have registered and paid the tax? It can hardly be supposed that Congress would have in mind the Secretary of State of the United States promulgating regulations for the benefit of unregistered drug peddlers, who were not allowed by the law to sell or ship the drugs under any circumstances.

Section 4 of the Act provides:

> "It shall be unlawful for any person who shall not have registered and paid the special tax as required by section one of this Act to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, to any person in any other State or Territory or the District of Columbia or any insular possession of the United States," etc.

Yet the words "any person" used in subdivision (c) are just as all-inclusive as the words "any person" in the first sentence of Section 2.

Subdivision (d) provides that Section 2 shall not apply—

> "To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial district, county, or municipal or insular hospitals or prisons."

It is seen that upon its face subdivision (d) does not confine the sale to registered persons, but a sensible construction of this subdivision necessarily implies that such was the purpose of Congress. Certainly Congress did not intend that unregistered persons could sell the drugs to any of the officers or governments mentioned. So, if these contentions are correct, then the whole of Section 2 applies to registered persons, and those who are ex-

cepted from the crime defined and denounced by Section 2 in the matter of sale, are likewise registered persons. The very fact that Congress only excepted certain registered persons from the operation of the penal provision contained in the first paragraph of Section 2, is almost conclusive evidence that the words "any person" used in its first sentence referred only to that class.

What then was the purpose of Congress in enacting Section 2? Its provisions would enable the Government to trace the narcotic drugs from the time of their production or importation until finally purchased as medicine by the consumer, or by the Government for its Army or Navy, or by the Health Officers designated, or until exported from the country as provided by subdivision (c) of the exceptions. Under the provision, "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned," the traffic in the drug, unless otherwise provided for, was regulated. This purpose was to be accomplished in the first paragraph of Section 2 by requiring both sellers and buyers, registered under the Act, under severe penalty, to make use of such order forms in their sales and purchases, which they were obliged to keep for a period of two years, readily accessible to the officers designated; by compelling physicians, dentists, and veterinary surgeons registered under the Act, to keep a record of such drugs dispensed or distributed by them, which record should be kept for two years, open to the inspection of such officers; by compelling the dealer who sold to a consumer to keep the prescriptions issued by such physicians, dentists or veterinary surgeons, for a period of two years, open to the inspection of such officers; and by requiring persons

who exported the drugs under the regulations promulgated by the Secretary of State, or sell to the departments of the Army and Navy or to health officers, to make use of the forms prepared by the Commissioner of Internal Revenue and furnished by the collectors of the several districts. What then is Section 2? Is it not a number of regulatory provisions enacted by Congress to regulate traffic in the narcotic drugs between and among persons whom the law has otherwise authorized to deal in the same?

In the case of *United States* v. *Doremus*, 249 U. S. 86, 94, Mr. Justice Day, speaking for this court, said:

> "Considering the full power of Congress over excise taxation, the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers and others who are named in Section 1 of the Act cannot be successfully disputed. The provisions of Section 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers, and requiring patients to obtain these drugs as a medicine from physicians, or upon regular pre-

scriptions. Ameris, being, as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax; at least, Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue. We cannot agree with the contention that the provisions of Section 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress, acting under its constitutional authority to impose excise taxes."

The defendant in the above case was a physician duly registered under the law, and the indictment charged him with selling, giving away and distributing a quantity of heroin to one Ameris. The question of whether Section 2 applied to an unregistered person did not arise in the case at all, and all that was said by this court in that case must be referred to registered persons. That part of the above quotation, namely, "The provisions of Section 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians," may possibly lead to misconstruction. The first section of the Act of December 17, 1914, of itself effectually confines sales to registered dealers, by penalizing sales made by unregistered persons and prohibiting them absolutely from making a sale. If the above quoted part means that it is the aim of Congress to confine Section 2 to registered dealers, then no doubt about it can arise.

It was undoubtedly the purpose of Congress in passing Section 2 to keep the traffic aboveboard, and subject to

inspection by those authorized to collect the revenue. The same may be said as to the provisions of Section 2, diminishing the opportunity of unauthorized persons to obtain the drugs and selling them clandestinely without paying the tax imposed by the Federal law. That part, "We cannot agree with the contention that the provisions of Section 2, controlling the disposition of these drugs in the ways described," certainly can have no reference except to registered persons, who are compelled under penalty to dispose of the drugs in the ways described.

This Court, in speaking of the Doremus case, said in Child Labor Tax Case, 259 U. S. 20:

> "The fourth case is *United States* v. *Doremus*, 249 U. S. 86, 63 L. Ed. 493, 39 Sup. Ct. Rep. 214. That involved the validity of the Narcotic Drug Act (December 17, 1914, 38 Stat. at L. 785, chap. 1, Comp. Stat. Section 6287g, 4 Fed. Stat. Anno. 2d ed. p. 177), which imposed a special tax on the manufacture, importation, and sale or gift of opium or coca leaves or their compounds or derivatives. It required every person subject to the special tax to register with the collector of internal revenue his name and place of business, and forbade him to sell except upon the written order of the person to whom the sale was made, on a form prescribed by the Commissioner of Internal Revenue. The vendor was required to keep the order for two years, and the purchaser to keep a duplicate for the same time, and all were to be subject to official inspection. Similar requirements were made as to sales upon prescriptions of a physician, and as to the dispensing of such drugs directly to a patient by a physician. The validity of a special tax in the nature of an excise tax on the manufacture, importation, and sale of such drugs was, of course, unquestioned. The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were

held to have a reasonable relation to the enforcement of the tax, and were therefore held valid."

This construction of the Doremus case conclusively shows that Section 2 was confined to a registered person, "and forbade him to sell except upon the written order of the person to whom the sale was made, on a form prescribed by the Commissioner of Internal Revenue."

The case of *W. S. Webb, et al.*, v. *United States*, 249 U. S. 96, 99, dealt entirely with registered persons, and what was said therein must be construed with reference to that class. Mr. Justice Day, again speaking for this court, reaffirmed the law as declared in the Doremus case.

In the case of *Hughes* v. *United States*, 253 Fed. 543, 544, the defendant was a registered physician, and the Eighth Circuit Court of Appeals said:

> "We think it cannot be said that the provisions referred to have no real or substantial relation to the raising of revenue. If they have such relation, we have nothing to do with any other purpose of Congress. The traffic in such drugs is of a peculiar character. Considerable of it is carried on covertly by peddlers, and the small bulk of the articles facilitates clandestine distribution. The difficulties of subjecting the traffic to excise and preventing frauds on the revenue are obvious, and it was competent for Congress to bring the traffic into the open. That there may be consumers of the drugs who cannot, or will not, obtain them in the ways provided, is not enough to condemn the statute. Substantially the same result might have followed a heavy tax on such transactions, as to which there would be no color for claim of unconstitutionality."

In the case of *United States* v. *Balint,* 258 U. S. 250, 254, this court said:

> "Section 2 of the Narcotic Act (38 Stat. at L. 786, chap. 1, Comp. Stat., Section 6287h, 4 Fed. Stat. Anno. 2d ed. p. 178), we give in part in the margin. It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the government, and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he sells the inhibited drug in ignorance of its character, to penalize him."

In the case of *United States* v. *Wong Sing,* 260 U. S. 18, this Court said:

> "In *United States* v. *Doremus* and *Webb* v. *United States*, it was decided that the power of Congress exerted through the Act of 1914, though the act might be denominated a revenue measure, could, as a complement to it, make criminally unlawful the sale, barter, or exchange of narcotic drugs except under certain prescribed conditions designed to make effective as a revenue measure. The principle of the decision applies to the Act of 1919, upon which count two is based. If the law can put conditions upon sellers, it can put conditions with a like purpose upon purchasers, which is done here."

If Section 2 is a mere complement of Section 1, and merely places conditions upon the seller, then it does not

apply to unregistered persons, for such persons were not allowed to sell upon conditions, or in any other way.

Judge Learned Hand, speaking for the court in *United States* v. *Rosenberg,* 251 Fed. 963, 964, said:

> "The chief question raised by the demurrer is whether Section 2 of the Harrison Act is valid as a revenue provision, as which alone it can stand. That section forbids any person from selling opium to another who does not present a written blank furnished by the Collector of Internal Revenue. The section later provides that the Collector may furnish these blanks only to registered persons, who are defined by Section 1, and who, roughly speaking, must be either sellers or makers. Presumably, the phrase 'any person' in the first sentence of the section means 'any registered person' as in Section 8 (*U. S.* v. *Jin Fuey Moy*, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917d, 854), though that question is not of much consequence here. In any view it follows that Section 2 forbids the sale of opium to any one not himself in turn a seller, and that it therefore forbids any distribution whatever to consumers, and this prohibition would be absolute except for the provisos (a), (b), (c), and (d)."

In the case of *Oakshette* v. *United States*, 260 Fed. 830, 831, the court said:

> "The contention of the plaintiff in error is that it was not within the issues presented by the indictments, since they merely charged sales illegal because not in pursuance of written orders. The only prohibitions of the statute are (1) sales by unregistered persons and (2) sales by registered persons not in pursuance of written orders. The plaintiff in error could only be charged with having made the one kind or the other. As he had registered, he was not

guilty of the first. If, having registered, he made sales or dispensed the drug without obtaining a written order, he was guilty of the second kind, unless because he came within one of the excepted classes. If he administered the drug only in the course of his professional practice, he came within one of the excepted classes, and was not guilty. If, however, he administered the drug, not in the course of his professional practice, then he would not bring himself within any of the excepted classes, and so came within the operation of the prohibition of Section 2, against selling or dispensing not in pursuance of a written order, and was properly charged with that offense. As a registered person he could have been charged with no other offense, since the Act creates no other out of the act of selling or dispensing by registered persons."

The amendment of February 24, 1919, 40 St. 1130, re-enacted without change November 23, 1921, 42 St. 298, and re-enacted June 2, 1924, 43 St. 328, embraced only Sections 1 and 6 of the Act of December 17, 1914, 38 St. 785, and as Section 6 referred only to certain preparations and remedies, it need not be further noticed. Section 1, as amended February 24, 1919, is as follows:

"Sec. 1006. That section 1 of the Act of Congress approved December 17, 1914, is hereby amended to read as follows:

Section 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided:

Every person who on January 1, 1919, is engaged in any of the activities above enumerated, or who between such date and the passage of this Act first engages in any of such activities, shall within 30 days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919; and

Every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th;

Importers, manufacturers, producers, or compounders, $24 per annum; wholesale dealers, $12 per annum; retail dealers, $6 per annum; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, shall pay $3 per annum.

Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.

Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: Provided, That the office, or if none, the residence, of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: Provided further, That officials of the United States, Territorial, District of Columbia,

or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter prescribed, but their right to this exemption shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe.

It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

That the word 'person' as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section.

That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

It shall be unlawful for any persons to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be *prima facie* evidence of liability to such special tax: Provided, That the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this Act; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept, as required by this Act of the drugs so dispensed, administered, distributed, or given away.

And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section.

That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed.

Importers, manufacturers and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect."

The construction which has been placed upon Section 1 of the Harrison Narcotic Act, as amended February 24, 1919, by the Circuit Court of Appeals of the Sixth Circuit in *Weaver* v. *United States*, 15 F. (2d), 38, 39, is stated so tersely and clearly, that that part of the opinion is set out in full:

> "Section 1 of the Harrison Anti-Narcotic Act as amended February 24, 1919, Section 1006 (Comp. St. Section 6287g), defines two distinct offenses: First, a sale in or from a stamped package by one who is required to register but has not registered with the collector of internal revenue and paid the special tax as required by law. Second, a purchase or sale in or from an unstamped package by any one, whether registered or not. *United States* v. *Wong Sing*, 260 U. S. 18, 21, 43 S. Ct. 7, 67 L. Ed. 105; *Bellomini* v. *U. S.*, (C. C. A.) 4 F. (2d) 104.

This amendment not only designates who are required to register and pay this special tax, but also the amount of tax each must pay. Importers, manufacturers, producers, and compounders are required to pay $24 per annum, wholesale dealers $12 per annum, retail dealers $6 per annum, and physicians and other practitioners lawfully entitled to dispense, give away, or administer any of the abovementioned drugs, $3 per annum. The amendment further defines importers, manufacturers, and dealers as follows: 'Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs, shall be deemed to be an importer, manufacturer or producer. Every person who sells or offers for sale any of said drugs in the original stamped packages * * * shall be deemed a wholesale dealer. Every person who sells or dispenses from original stamped packages * * * shall be deemed a retail dealer.'

It would seem clear from the provisions of the amendment fixing this special tax to be paid only by importers, manufacturers, producers, wholesale dealers, retail dealers, and physicians or other practitioners authorized to dispense the drugs, when read in connection with the definition of importers, manufacturers, and dealers, that these are the only ones required to register or that are eligible to registry.

This provision of the amendment requiring registration and the payment of the special tax relates to the regulation and control of the lawful sale of morphine in or from stamped packages only, and, evidently for the purpose of making the act effective as a revenue measure, provides a penalty for any one making a sale in or from a stamped package without having registered and paid the special tax. In this connection it is further provided that the possession of any original stamped package containing any of the aforesaid drugs by any person who

has not registered and paid the special tax shall be *prima facie* evidence of liability to such special tax.

This amended section, after providing how and by whom lawful sales of these drugs may be made, further provides that there shall be levied, assessed, collected and paid upon opium, coca leaves, any compounds, salts, derivatives or preparation thereof, produced in, or imported into the United States and sold or removed for consumption or sale, an internal revenue tax at the rate of one cent per ounce or any fraction thereof and that it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package.

Under this provision of section 1 as amended, it is wholly immaterial whether the person accused of selling or purchasing in and from an unstamped package has or has not registered and paid the special tax, for the reason that, if the accused had registered and paid the special tax, it would be no defense to an indictment charging the purchase or sale of opium or its derivatives in or from an unstamped package. *U. S.* v. *Wong Sing, supra; Ballestrero* v. *U. S.*, (C. C. A.) 5 F. (2d) 503."

That construction was followed by the Circuit Court of Appeals, Eighth Circuit, in *O'Neill* v. *United States*, 19 F. (2d) 322, and *Butler, et al.*, v. *United States*, 20 F. (2d) 570, and *Martin* v *U. S.* 20 F. (2d) 785. It was also held in the last two cases that the presumption following the crime denounced, of selling not in or from the original stamped package, from the possession of the drug only applied to the second or last penal provision of Section 1 as amended, and that the presumption arising from possession in Section 8 did not apply to such a case. That Section 1 as amended likely worked a change in the persons required to register, is

intimated in *Bellomini* v. *United States*, 4 F. (2d) 104, 105.

In the case of *Wong Sing* v. *United States*, 260 U. S. 18, 22, this Court said:

> "We are unable to concur with the district court. The provisions quoted by the court have a certain relation, but they have also a certain independence. The first makes it 'unlawful for any person to purchase' the drugs; the second enumerates other persons who have a larger connection with the drugs, and requires them to register the fact and pay the tax prescribed."

Again:

> "There is another distinction between the Jin Fuey Moy case and this. In that case, which was under the Act of 1914, it was intimated that the persons affected by the act received definition from the requirement of registration. This case is under the Act of 1919, and it, as we have said, does not require registration."

That was a case of selling not in or from the original stamped package. The second count of the indictment in the instant case did not charge that the defendant was a person who had registered and paid the special tax, or a person required to register and pay the special tax, nor did it charge that the sale of the morphine was in a stamped or unstamped original package, or that it was sold not in or from an original unstamped package. Under the construction placed upon Section 1, as amended by the Act of February 24, 1919, in the Weaver, O'Neill and Butler cases above cited, there were only two classes of dealers who were required or who were eligible to register, namely, wholesale and retail dealers. If the

defendant sold in the original stamped package, he was a wholesale dealer, and required to register under the terms of Section 1 as amended. If he sold from the original stamped package, he was a retail dealer, and required to register. If he sold the morphine in or from an unstamped package, he was liable to the penalties provided by the second penal provision of Section 1, not only with reference to the sale, but with reference to its purchase. So, then, under any view of the situation, Section 1 of the Act in either its first or second penal provision, fully covered the case of the defendant, and in view of the fact that Section 1 of the Act as amended fully covers all like cases in its first and second penal provisions, then the conclusion is inevitable that Section 2 relates only to registered persons, or at least to persons who are required to register and pay the special tax. If the first sentence of Section 2 includes all persons within the United States, then it would be lawful for any person to sell under and in pursuance of a written order of the buyer, on a form issued in blank by the Commissioner of Internal Revenue.

## Question II

"If a broader construction is given to said provision, is the provision as so construed, constitutional?"

ARGUMENT

Section 1, as amended by the Act of February 24, 1919, restricts persons who are eligible to registration to four distinct classes, namely, (1) importers, manufacturers, producers and compounders; (2) wholesale dealers; (3) retail dealers; and (4) physicians, dentists, veterinary surgeons and other practitioners lawfully entitled to distribute, dispense, give away or administer any of the aforesaid drugs to patients upon whom they, in the course of their professional practice, are in attendance. Any person coming within any of the four classes is required to register and pay the special tax, and no person not coming within any of such classes could register, if he would. The Section, as amended, defines each of said classes, except physicians, dentists, veterinary surgeons, etc., for which class no definition was necessary. The section, as amended, only requires two classes of dealers to register, namely, wholesale and retail dealers, and as defined, a wholesale dealer is one who sells or offers to sell any of said drugs in the original stamped packages, and a retail dealer is one who sells or dispenses from original stamped packages.

*Weaver* v. *United States*, 15 F. (2d), 38, 39.
*O'Neil* v. *United States*, 19 F. (2d), 322.
*Butler, et al.*, v. *United States*, 20 F. (2d), 570.

By naming and defining the classes, the conclusion is inescapable that Congress intended only those persons who came within the classes named and defined should

be required to register and pay the special tax, and none other.

If the above construction is correct, and Congress has limited the requirement of registration to persons coming within the classes named and defined, and only made such persons eligible to registry, then, if Section 2 be construed as including all persons in the United States, it is unconstitutional under the doctrine laid down in the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394. That case and this are parallel, at least, insofar as the principle is concerned, that the Harrison Narcotic Act is a revenue measure and can only be applied to those who are required to register and pay the special tax. It is only from those persons that the Government can derive any revenue by means of registration, and the only constitutional authority which Congress has is to enact such a law for revenue. It could not go outside of those persons required to pay it. In that case this Court said:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *United States ex rel. Atty. Gen.* v. *Delaware & H. Co.*, 213 U. S. 366, 408, 53 L. Ed. 836, 849, 29 Sup. Ct. Rep. 527. If we could know judicially that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the states, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. *United States* v. *De Witt*, 9 Wall. 41, 19 L. Ed. 593. The government invokes article

6 of the Constitution, that treaties made under the authority of the United States shall be the supreme law of the land. But the question arises under a statute, not under a treaty. The statute does not purport to be in execution of a treaty, but calls itself a registration and taxing act. The provision before us was not required by the opium convention, and whether this section is entitled to the supremacy claimed by the government for treaties is, to say the least, another grave question; and, if it is reasonably possible, the act should be read so as to avoid both.

The foregoing consideration gains some additional force from the penalty imposed by Section 9 upon any person who violates any of the requirements of the act. It is a fine of not more than $2,000, or imprisonment for not more than five years, or both, in the discretion of the court. Only words from which there is no escape could warrant the conclusion that Congress meant to strain its power almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession, criminal or at least *prima facie* criminal, and subject to the serious punishment made possible by Section 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right.

Approaching the issue from this point of view we conclude that 'any person not registered' in Section 8 cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by Section 1."

The case of *Wong Sing* v. *United States*, 260 U. S. 18, was a prosecution for selling not in or from the original stamped package, and Section 2 was involved, but this Court, in construing the Jin Fuey Moy case, said:

> "There is another distinction between the Jin Fuey Moy case and this. In that case, which was under the Act of 1914, it was intimated that the persons affected by the act received definition from the requirement of registration. This case is under the Act of 1919, and it, as we have said, does not require registration."

It must be remembered that this case does not involve a question of foreign or interstate commerce, and the statute in question, as said in the Jin Fuey Moy case, does not purport to be in execution of any treaty. If it were contended that it was passed in execution of a treaty, then, as said in the Jin Fuey Moy case, another grave question would arise.

In the case of *Doremus* v. *United States*, 249 U. S. 86, 93, this Court said:

> "This statute purports to be passed under the authority of the Constitution, Article 1, Section 8, which gives the Congress power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imports and excises shall be uniform throughout the United States.'"

This Court again said in the Doremus case, p. 94:

> "The legislation under consideration was before us in a case concerning Section 8 of the act, and in the course of the decision we said: 'It may be

assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure was right.' *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402, 60 L. Ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854. Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers and others who are named in Section 1 of the act cannot be successfully disputed. The provisions of Section 2 to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law."

That part of the last quotation, "Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions (Section 2) in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers and others who are named in Section 1 of the act cannot be successfully disputed. The provisions of Section 2 to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate pre-

scriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue," cannot have reference to the law as it now stands. The Doremus case arose under the original Act of December 17, 1914, and is not applicable to the first section of that Act as amended by the Act of February 24, 1919. Under the amended Act only certain persons are allowed or required to register, and only such persons are penalized for doing any of the things in relation to the drugs which would require them to register, and if Section 2 is construed to apply to all persons, then it goes beyond Section 1 as amended, and it cannot assist in the collection of the revenue. The provision in Section 2, that the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall cause suitable forms to be prepared for the purposes above mentioned, and the provision, that no collector shall sell any such forms to any person other than a person who has registered and paid the special tax as required by Section 1, and the provision, that it shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business, and the provision, that no sales can be made except upon order forms, or upon a physician's prescriptions, or to certain governments connected with the health service or the army and navy, show conclusively that the purpose of Congress in enacting Section 2 was to confine the drugs to their use as medicine. When the restrictions and conditions which the Congress attached to the sale and distribution of the drugs under Section 2 are carefully considered, it is

clearly seen that Congress had in mind the stamping out of drug addiction, and thereby to subserve the health and general welfare of the people of the United States. If Section 2 covers all persons within the United States, then it was not merely incident to the raising and protection of the revenue, because all persons within the United States were not required to pay it, and unless it is restricted to those who are required to pay it, then, as to all other persons, it is necessarily unconstitutional and void.

As said in the Jin Fuey Moy case:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure, was right."

So, then, if Congress intended a moral end, it could only reach that end through a revenue measure, and Section 2 could only assist in protecting that revenue, and if it applied to more persons than the revenue measure covered, it was as to such persons unconstitutional. If Congress only intended to aid the collection of the revenue by the enactment of Section 2, why then would it not permit persons who had not registered to procure order forms and purchase the drugs upon them, or upon a physician's prescription? By so limiting and conditioning the sale of the drugs as it did, and limiting the use of the drugs to medicine, it is manifest that Congress had the moral rather than the revenue end in view in passing Section 2.

It needs no argument that the public health and morals are subjects reserved to the several states and to the

people thereof, as provided by Amendment 10 to the Constitution of the United States.

In *United States* v. *Daugherty*, 269 U. S. 360, the Court said (p. 362):

> "The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus*, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44, 67; and *Linder* v. *United States*, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

In *Hammer* v. *Dagenhart*, 247 U. S. 251, which passed upon the law that prohibited shipment in interstate commerce of goods from factories where child labor was employed, this court said (p. 274):

> "The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.
>
> Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,' said this court in *United States* v. *DeWitt*, 9 Wall. 41, 45, 19 L. Ed. 593, 594, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller* v. *United States*, 213 U. S. 138, 144-146, 53 L. Ed. 737-740, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Cooley, Const. Lim., 7th Ed., p. 11."

Again (p. 275):

> "A statute must be judged by its natural and reasonable effect. *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34, 43 L. Ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases (*United States* v. *Ohio Oil Co.*) 234 U. S. 548, 560, 58 L. Ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution."

In the *Child Labor Tax Case*, 259 U. S. 20, this Court dealt with a tax upon factory owners who employed child labor. In the course of the opinion the Court said (p. 36):

> "The law is attacked on the ground that it is a regulation of the employment of child labor in the states—an exclusively state function under the Federal Constitution and within the reservations of the 10th Amendment. It is defended on the ground that it is a mere excise tax, levied by the Congress of the United States under its broad power of taxation conferred by Section 8, Article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might

not be permitted, under previous decisions of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business."

And again (p. 38):

"The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard."

In *Hill* v. *Wallace*, 259 U. S. 44, this court said (p. 68):

> "We come to the question, then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the state. *House* v. *Mayes*, 219 U. S. 270, 55 L. Ed. 213, 31 Sup. Ct. Rep. 234; *Broadnax* v. *Missouri*, 219 U. S. 285, 55 L. Ed. 219, 31 Sup. Ct. Rep. 238. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words 'interstate commerce' are not to be found in any part of the act, from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the city of Chicago, for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem, from evidence before it, to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind, and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

In *Linder* v. *United States*, 268 U. S. 5, this court said (p. 17):

> "The declared object of the Narcotic Law is to provide revenue, and this court has held that what-

ever additional moral end it may have in view must 'be reached only through a revenue measure.' *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402, 60 L. Ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced. *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, 4 L. Ed. 579, 605; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *United States* v. *Dewitt*, 9 Wall. 41, 19 L. Ed. 593; *Keller* v. *United States*, 213 U. S. 138, 53 L. Ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; *Hammer* v. *Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; *Child Labor Tax Case*, 259 U. S. 20, 66 L. Ed. 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449. In the light of these principles and not forgetting the familiar rule, that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score,' the provisions of this statute must be interpreted and applied."

If the person was not eligible or required to register, then, as to him, the law as a tax measure was inapplicable. As was said by Mr. Justice Butler in his dissenting opinion in the case of *United States* v. *One Ford Coupe*, 272 U. S. 321, 350:

"Moreover, when these facts are considered in the light of what everyone knows, they utterly fail

to support the allegation that Killian had the illicit whiskey concealed in the automobile *with intent to defraud the United States of a tax on that whiskey.* Indeed, the facts alleged negative that purpose. The attempt to make out a case against the revenues has no foundation in fact. It was impossible to pay the so-called tax. Crime had to be committed before liability for the imposition arose. Taxes are not so conditioned."

## Question III

"Is it necessary for the Government in prosecuting under said provision, to allege and prove that defendant was a person required by Section 1 to register and pay the tax?"

ARGUMENT

Question III is only asked in the event Question I is answered in the affirmative. It would seem to be a sufficient answer to Question III to say that, unless it was alleged in the indictment that defendant was required to register and pay the special tax, no crime would be charged. In other words, unless it was charged in the indictment that defendant was then and there required to register and pay the special tax, the court could not tell from the face of the indictment that any crime was committed, or that the person charged could, by the act alleged, commit the crime. If only those of a certain class can commit the crime, it must appear upon the face of the indictment that defendant belonged to that class, otherwise it could not be determined from the indictment that any crime was charged. Put in another way, if only a person required to register and pay the special tax can commit the crime by doing the act alleged, and a person who is not required to register and pay the special tax cannot commit the crime, even though he commits the act, and only the act is alleged, then it is respectfully submitted that a court cannot determine from the act alleged that any crime has been committed. If the fact that only a person required to register and pay the special tax could commit the crime by doing the act, then his status, as such, must be alleged, for without such allegation no crime is charged. The fact that he is a person

required to register and pay the tax is an essential element of the crime, and it is a fundamental rule of criminal pleading that a sufficient indictment should allege every essential element constituting the offense, and it is not good if it fails to do so, even though it follows the language of the statute. This court in *United States* v. *Evans*, 153 U. S. 584, said (p. 587):

> "This case involves the sufficiency of an indictment for the willful misapplication of the funds of a national bank, in violation of Section 5209 of the Revised Statutes.
>
> A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States* v. *Mills*, 32 U. S. 7 Pet. 138 (8:636), that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States* v. *Carll*, 105 U. S. 611 (26:1135), 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States* v. *Cook*, 84 U. S. 17 Wall. 174 (21:539); *United States* v. *Cruikshank*, 92 U. S. 542, 558 (23:588, 593). 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' *United States* v. *Carll*, 105 U. S. 611 (26:1135).
>
> Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt

in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *United States* v. *Simmons*, 96 U. S. 360 (24:310); *United States* v. *Hess*, 124 U. S. 483 (31:516); *Pettibone* v. *United States*, 148 U. S. 197 (37:419); *Re Greene*, 52 Fed. Rep. 104."

In the case of *United States* v. *Cook*, 17 Wall. 1, 84 U. S. 162, this court said (p. 174):

"With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error. Arch. Cr. Pl. Cases, 15th Ed. 54.

Text writers and courts of justice have sometimes said, that if the exception is in the enacting clause, the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense and must be shown by the accused. Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception. *Com.* v. *Hart*, 11 Cush. 132.

Cases have also arisen, and others may readily be supposed, where the exception, though in a sub-

> sequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. *State* v. *Abbey*, 29 Vt. 66; 1 Bish. Cr. Proc., 2d Ed., Section 639, n. 3."

It is respectfully submitted that by necessary implication unregistered persons, and persons not required to register and pay the special tax, are excepted from the operation of Section 2 of the Act, in the same way as they were excepted under the construction of the Jin Fuey Moy case from the operation of Section 8.

In *United States* v. *Hess*, 124 U. S. 483, this court said (p. 486):

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intend-

ment, or implication, and the charge must be made directly and not inferentially or by way of recital."

In *United States* v. *Cruikshank*, 92 U. S. 542, this court said (pp. 557, 558):

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *U. S.* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 539, that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In the case of *United States* v. *Reese*, 92 U. S. 214, this court said (p. 220):

> "If the Legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In his concurring opinion in the same case, Judge Clifford, further proceeding, said (pp. 233, 234):

> "Similar views are expressed by this court in *U. S.* v. *Gooding*, 12 Wheat. 474, in which the opinion was given by Mr. Justice Story. Having first stated the general rule, that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute, he proceeds to remark: 'We say, in general; for there are, doubtless, cases where more particularity is required, either from the obvious intention of the Legislature or from the application of known principles of law. Known principles of law require more particularity in this case, in order that all the ingredients of the offense may be accurately and clearly alleged; and it is equally clear that the intention of the Legislature also requires the same thing, as it is obvious that the mere statement of the party that he offered to perform the prerequisite was never intended to be made equivalent to performance, unless such statement was accompanied by an offer to pay the tax, and under circumstances which show that he was ready and able to make the payment. Authorities are not necessary to prove that an indictment upon a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted precisely within the provisions of the statute defining the offense."

In the case of *United States* v. *Mann*, 95 U. S. 580, this court said (pp. 583, 584):

> "Information for offenses or penalties created and defined by statute, like indictments, must follow the words of the statute; and where there is no substantial departure from that requirement, the information, like the indictment, is in general sufficient, except in cases where the statute is elliptical, or where by necessary implication other constituents are component parts of the offense. Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient; and the rule is universal, that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer. *U. S.* v. *Cook*, 17 Wall. 168, 21 L. Ed. 538; 1 Bishop Cr. Proc., 2d Ed., Sec. 81; Archb. Cr. Pl. & Ev., 18th Ed., 54."

To the same effect is *United States* v. *Carll*, 105 U. S. 611, in which this court said (pp. 612, 613):

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *U. S.* v. *Cruikshank*, 92 U. S. 542 (XXIII, 588); *U. S.* v. *Simmons*, 96 U. S. 360 (XXIV, 819); *Com.* v. *Clifford*, 8 Cush. 215; *Com.* v. *Bean*, 11 Cush. 414;

*Com.* v. *Bean*, 14 Gray 52; *Com.* v. *Filburn*, 119 Mass. 297.

The language of the statute on which this indictment is founded, includes the case of every person who with intent to defraud utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

This indictment, by omitting the allegation, contained in the indictment in *U. S.* v. *Howell*, 11 Wall. 432 (78 U. S. XX 195), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of Section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative."

It would seem that the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, would settle this question. That case came to this Court upon a judgment quashing an indictment by the District Court. The facts are stated as follows:

"This is an indictment under Section 8 of the act of December 17, 1914, chap. 1, 38 Stat. at L. 785, 789. It was quashed by the district court on the ground that the statute did not apply to the case. 225 Fed. 1003. The indictment charges a conspiracy

with Willie Martin to have in Martin's possession opium and salts thereof, to-wit, one dram of morphine sulphate. It alleges that Martin was not registered with the collector of internal revenue of the district, and had not paid the special tax required; that the defendant, for the purpose of executing the conspiracy, issued to Martin a written prescription for the morphine sulphate, and that he did not issue it in good faith, but knew that the drug was not given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium. The question is whether the possession conspired for is within the prohibitions of the act."

The judgment of the District Court quashing the indictment was affirmed. It is respectfully submitted that if the indictment in that case did not apply to Section 8, because Section 8 only applied to persons required to register and pay the special tax, then Question III must be answered in the affirmative, for if Section 2 only applies to persons who are required to register, and the indictment omits that allegation, then such indictment would be insufficient upon the principle enunciated in the Jin Fuey Moy case.

31 *Corpus Juris,* 691 lays down the rule thus:

> "Where an offense may be committed by persons of a certain description only, defendant must be shown to have been of that description at the time of the act." Citing *U. S.* v. *McCormick*, 28 F. Cas. No. 16663.

The same authority again says at 694, 695:

> "When the act as to which the offense is predicated is not in itself unlawful, but becomes so by reason of other facts connected with it, such facts must be alleged. So when a statute enacts that any one

> of a certain class of persons who shall do or omit a certain act, under certain circumstances, shall be guilty of a crime, the indictment must describe the person indicted as one of that class and aver that he did or omitted the act under the circumstances making it criminal." Citing *Mark Yick Hee* v. *U. S.*, 223 Fed. 732; *U. S.* v. *Woods*, 224 Fed. 278.

Again 31 *Corpus Juris*, 713, says:

> "It is not sufficient to charge an offense in the language of the statute alone, where by its generality it may embrace acts which it was not the intent of the statute to punish. Such facts must be alleged that, if proved, defendant cannot be innocent. If the statute is confined to certain classes of persons * * * the indictment must show that the party indicted, and the time and place when the alleged criminal acts were perpetrated, were such as to bring the supposed offense directly within the statute." Citing *U. S.* v. *Metzdorf*, 252 Fed. 933; *Martin* v. *U. S.*, 168 Fed. 198; *U. S.* v. *Pond*, 27 F. Cas. No. 16067; *Stettinius* v. *U. S.*, 22 F. Cas. No. 13387.

The question whether such an allegation, if made, must be proved, does not seem to admit a very serious argument. It is a fundamental rule of criminal procedure that every essential allegation of an indictment must be proved as alleged, and the burden of making such proof rests upon the Government. This Court in *Agnew* v. *United States*, 165 U. S. 36, said (p. 49, 50):

> "Undoubtedly in criminal cases the burden of establishing guilt rests upon the prosecution from the beginning to the end of the trial."

Again this Court in *Davis* v. *United States,* 160 U. S. 469, said (p. 485):

> "The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime."

Again in the same case (p. 487):

> "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime."

It must be conceded that if the indictment charged that "defendant was then and there a person required to register and pay the special tax," or if it charged that "defendant was then and there a person who had registered and paid the special tax," that these would be affirmative and not negative allegations. It is sometimes asserted that the burden does not rest upon the prosecution to prove a negative, but such cases are not applicable to the case at bar. 33 Corpus Juris 748 lays down the rule thus:

> "But, if the holding of a license, instead of being a defense to the action, is a constituent element of

the offense, the particular statute applying only to licensed dealers, then the averment in regard to license is affirmative rather than negative, and it devolves upon the prosecution to show that defendant was licensed." Citing *State* v. *Brady*, 41 Conn. 588; *Bloomington* v. *Strehle*, 47 Ill. 72; *Jordan* v. *Nicolin*, 84 Minn. 370; *State* v. *Hall*, 158 Mo. A. 123; *State* v. *Nethken*, 60 W. Va. 673; *State* v. *Whitter*, 18 W. Va. 306.

Nor is this a case where a fact is peculiarly within the knowledge of the defendant where the prosecution would be relieved of the burden of proving such fact. Whether a person is required to register or pay the special tax is a question of law applied to the facts of each particular case and is not within the peculiar or particular knowledge of any one.

Nor is this a case where there is any presumption which would relieve the Government of proving that a defendant was required to register and pay the special tax, or that he had registered and paid the special tax. Only two provisions in the law can be thought of as having any possible relation to the question in hand. Section 8 denounces the possession of the drugs, but was construed by this Court in the Jin Fuey Moy case as only applying to persons who were required to register and pay the special tax. It then provides:

> "And such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of Section 1 of this Act."

In the case of *Butler* v. *United States*, 20 F. (2d), 570, the Circuit Court of Appeals, Eighth Circuit, said:

> "But this provision of section 8 has reference only to persons who are required to register as

provided in section 1. (*United States* v. *Jin Fuey Moy,* 241 U. S. 394, 36, S. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; *Lamento* v. *United States,* 4 F. (2d), 901 (C. C. A. 8); and section 1 requires those persons only to register who are manufacturers, etc., or dealers; and dealers are only those persons who sell in or from original packages. As there was no proof that defendants belonged to the class of persons specified in section 1, the presumption had no application to them. The presumption, therefore, of section 8 does not help out the situation."

The only other provision of the law is found in the Amendment of February 24, 1919. It is found in the section which denounces purchasing, selling, dispensing or distributing in or from the original stamped package. That section in part says:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be *prima facie* evidence of liability to such special tax."

The United States Circuit Court of Appeals, Eighth Circuit, in *O'Neill* v. *United States,* 19 F. (2d), 322, 327, said:

"The morphine sold in the case at bar was neither in nor from the original stamped package. The sale

to Feinberg is the sole evidence relied upon by the government to show that O'Neill was a dealer and a person required to register under the act. If O'Neill was dealing in unstamped drugs, he was neither a wholesale dealer nor a retail dealer as defined in section 1, and was therefore not a person required to register under the act. If this be true, then the sale by O'Neill to Feinberg violated the second, and not the first, penal provision of the section. The contention is made that the possession by O'Neill of the unstamped drugs is *prima facie* evidence of the violation of the first penal provision of Section 1. This contention is predicated upon the language which follows the second penal provision and reads as follows: 'And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found.' This contention finds support in the case of *Pierriero* v. *U. S.* (C. C. A. 4), 271 F. 912. The contention is made that the provision of Section 1 last above quoted applies only to the second penal provision of the Act. If the provisions for registration and payment of tax by dealers is limited to persons who sell in or from the original stamped package, then to construe the provision of the Act last above quoted as applicable to the first, as well as the second penal provision, would be to declare that possession by a person of unstamped drugs is *prima facie* evidence of the fact that he deals in stamped drugs. This would be a wholly illogical and irrational presumption; it would be so unreasonable as to be a purely arbitrary mandate. The fact that one possesses unstamped drugs instead of indicating that he deals in stamped drugs, indicates just the opposite.

The general principle is well recognized that even in criminal prosecutions, Congress or a state Legislature may with certain limitations enact that when certain facts have been proved that shall be *prima*

*facie* evidence of the existence of the main fact in question. 12 C. J., p. 823, Section 285. The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate; and the accused must not be deprived of a proper opportunity to present his defense to the main fact so presumed and have the case submitted upon all the evidence to the jury for its decision. *People* v. *Cannon*, 139 N. Y. 32, 34 N. E. 759, 762, 36 Am. St. Rep. 668; *Hawes* v. *Georgia*, 258 U. S. 1, 4, 42 S. Ct. 204, 66 L. Ed. 431; *Bailey* v. *Alabama*, 219 U. S. 219, 238, 239, 31 S. Ct. 145, 55 L. Ed. 191; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899; *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; *U. S.* v. *Luria* (D. C. N. Y.), 184 F. 643, 647, 648; *Hall* v. *Johnson*, 87 Or. 21, 169 P. 515, 516, Ann. Cas. 1918E, 49."

In conclusion it may be said in general that some of the District Courts recognized the necessity of the allegation in the indictment as applied to Section 8, that the defendant was a person required to register and pay the special tax, even before the decision in the Jin Fuey Moy case. See *United States* v. *Carney*, 228 Fed. 165, and cases therein cited. Since the decision in the Jin Fuey Moy case practically all of the District Courts have recognized the necessity of such an averment.

## Question IV

"Is the allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, sufficient to charge that defendant was a person required to be registered and to pay the tax under Section 1?"

### ARGUMENT

It would seem that if Question III is answered in the affirmative, that Question IV must be answered in the negative. If it is necessary for the Government, in prosecuting under said provision (Section 2) to allege that defendant was a person required by Section 1 to register and pay the tax, then that requirement is not met if that allegation is omitted from the indictment. It can hardly be contended that this necessary allegation is supplied by the allegation that, "defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue." The latter allegation is necessary in every case where it is undertaken to prosecute under Section 2, for it is, in part, at least, descriptive of the offense therein denounced. It is a fundamental rule of criminal proceedings, that an indictment must follow the language of the statute, or use words of equivalent import, in order to identify and describe the offense, which it is claimed the defendant committed. But if Section 2 only applies to persons who are required to register, or persons who have registered, then if it sought to prosecute under Section 2, it is necessary to allege that fact in order to show that defendant is

amenable to that section, and in addition thereto, to allege that such sale was made "not in pursuance of the written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue." If the first question is answered in the affirmative, then it must necessarily follow, under the authority of the Jin Fuey Moy case and other cases cited, that both elements enter into the offense, and that both allegations are necessary.

In *United States* v. *Lacher*, 134 U. S. 624, this court said (p. 628):

> "As contended on behalf of the defendant, there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States* v. *Wiltberger*, 18 U. S. 5 Wheat. 76 (5:37); *United States* v. *Morris*, 39 U. S. 14 Pet. 464 (10:543); *American Fur Co.* v. *United States*, 27 U. S. 2 Pet. 358, 367 (7:450, 453).
>
> 'It appears to me,' said Mr. Justice Story, in *United States* v. *Winn*, 3 Sumn. 209, 211, 'that the proper course, in all these cases, is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature.'"

In *Todd* v. *United States*, 158 U. S. 278, this court said (p. 282):

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that

no act, however wrongful, can be punished under a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' *United States* v. *Lacher*, 134 U. S. 624 (33:1080); Endlich, Interpretation of Statutes, Section 329; Pomeroy's Sedgwick on Statutory and Constitution Construction (2d ed.) 280."

In *United States* v. *Gooding*, 12 Wheat. 460, 474, this court said:

"In general, it may be said that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute. We say in general, for there are doubtless cases where more particularity is required, either from the *obvious intention of the Legislature*, or from the application of known principles of law." (Italics ours.)

In the case of *United States* v. *Mann*, 95 U. S. 580, this court said (p. 583):

"Informations for offenses or penalties created and defined by statute, like indictments, must follow the words of the statute; and where there is no substantial departure from that requirement, the information, like the indictment, is in general sufficient, except in cases where the statute is elliptical, *or where by necessary implication other constituents are component parts of the offense*. Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient of which the offense is composed must be *accurately and clearly* expressed in the indictment or information, or the pleading will be held bad on demurrer. *U. S.* v. *Cook*, 17 Wall. 168, 21 L. ed. 538; 1 Bishop, Cr. Proc., 2d ed., sec. 81; Archb., Cr. Pl. & Ev., 18th ed., 54." (Italics ours.)

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In the case of *United States* v. *Carll*, 105 U. S. 611, 612, in a statement of the case by Mr. Justice Gray, it was said:

> "This was an indictment, found in the Circuit Court, on Section 5431 of the Revised Statutes, by which it is enacted that 'Every person who, with intent to defraud, passes, utters, publishes or sells any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be punished by a fine of not more than $5,000, and by imprisonment at hard labor not more than fifteen years.'
>
> Each count of the indictment alleged that the defendant, at a certain time and place, 'Feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter and publish upon and to the said Bank of the Metropolis a falsely made, forged, counterfeited and altered obligation and security of the United States' (which was set forth according to its tenor), against the peace, and contrary to the form of the statute.
>
> The defendant, having been tried before Judge Benedict, and convicted by the jury under instructions which required them to be satisfied of the facts alleged, and that the defendant, at the time of uttering the obligations, knew them to be false, forged, counterfeited and altered, moved in arrest of judgment for the insufficiency of the indictment. At the hearing of this motion before Judge Blatchford and Judge Benedict, they were divided in opinion upon the question, stated in various forms in their certificate, but in substance this: whether the indictment, setting forth the offense in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited and altered, was sufficient, after verdict, to warrant judgment thereon."

It is seen that the indictment in the Carll case follows the language of the statute. The statute omitted knowledge on the part of the defendant that the instrument was forged when uttered, and the indictment did not include any allegation to that effect. The opinion has been set out in full heretofore, but this part is again quoted (p. 612):

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Simmons*, 96 U. S. 360; *Com.* v. *Clifford*, 8 Cush. 215; *Com.* v. *Bean*, 11 Cush. 414; *Com.* v. *Bean*, 14 Gray 52; *Com.* v. *Filburn*, 119 Mass. 297."

The court held that knowledge on the part of the defendant that the instrument was forged at the time he uttered it, was an essential element of the crime not included in the statute, but should have been included, "and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." Applying that case to this, if it could be inferred by the trial court in the light of the common law

or other parts of the statute, that Section 2 only referred to persons required to register and pay the special tax, or to persons who had registered, and the court would so instruct the jury, it would not dispense with the necessity of making such allegation in the indictment. The Carll case has never been departed from by this Court, and in cases to which it is applicable it is still the leading case in the United States. Unless all the elements or ingredients of a crime are charged in an indictment, then no crime is charged at all, even though it follows the language of the statute, for the statute may, according to legislative intent, reveal that other elements, not expressly included in it, were intended to be made a part of the crime which it denounces.

In *United States* v. *Reese*, 92 U. S. 214, Mr. Justice Clifford in his concurring opinion says (p. 232):

> "4. Beyond all doubt, the general rule is, that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute; and it is safe to admit that that general rule is supported by many decided cases of the highest authority; but it is equally certain that exceptions to the rule exist, which are as well established as the rule itself, most of which result from another rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, and is one of universal application; that every ingredient of the offense must be accurately and clearly expressed; or, in other words: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. *U. S.* v. *Cook*, *supra*.
>
> Speaking of that principle, Mr. Bishop says it pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we

can no more escape from it than from the atmosphere which surrounds us. 1 Biship, Cr. Proc., 2d ed., Section 81; Archb., Cr. Pl., 15th ed., 54; I Stark. Cr. Pl. 236; 1 Am. Cr. L., 6th rev. ed., Section 364; *Steel* v. *Smith*, 1 Barn. & Ald. 99.

Examples of the kind, where it has been held that exceptions exist to the rule that it is sufficient in an indictment founded upon a statute to follow the words of the statute, are very numerous, and show that many of the exceptions have become as extensively recognized, and are as firmly settled as any rule of pleading in the criminal law. Moreover, says Mr. Bishop, there must be such an averment of facts as shows *prima facie* guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible non-existence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient, which is the exact case before the court. 1 Bishop, Cr. Proc., 2d ed., Section 325."

In *United States* v. *Simmons*, 96 U. S. 360, this court said (p. 362):

"The second count, pursuing the words of Section 3266 of the Revised Statutes, charges that the defendant 'did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain building and on certain premises where vinegar was manufactured and produced, against the peace of the United States and their dignity,' etc.

Under this count we are asked the following questions; first, whether it is sufficient, in an indictment drawn under that portion of the section which prohibits the use of a still, boiler or other vessel, for the purpose of distilling, in any building or on premises where vinegar is manufactured or produced, to charge the offense in the words of the statute, etc.

> The first question is answered in the negative.
>
> Where the offense is purely statutory, having no relation to the common law, it is, 'As a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., Sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

It may be argued that it is necessarily implied that the defendant is required to register and pay the special tax, because he is charged with selling a drug not under a written order of the buyer, on a form issued in blank for that purpose by the Commissioner of Internal Revenue. Would it be contended at this late day that a defendant must resort to argument and implication to ascertain what crime he is charged with, and what he is called upon to meet? It is the function of the indictment to clearly and fully inform the defendant of the precise crime he is called upon to answer, so that he may prepare his defense and plead the record of an acquittal or a conviction in bar of another prosecution for the same offense. As said by this court in *United States* v. *Cruikshank*, 92 U. S. 54:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional

> right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *U. S.* v. *Mills*, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 539, that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' "

In the case of *United States* v. *Evans*, 153 U. S. 584, it was said (p. 587):

> "Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *United States* v. *Simmons*, 96 U. S. 360 (24:810); *United States* v. *Hess*, 124 U. S. 483 (31:516); *Pettibone* v. *United States*, 148 U. S. 197 (37:419); *Re Greene*, 52 Fed. Rep. 104."

In *United States* v. *Hess*, 124 U. S. 483, the court, speaking of indictments, said (p. 486):

> "The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by *intendment or implication*, and the charge must be made *directly, and not inferentially* or by way of recital." (Italics ours.)

In *Pettibone* v. *United States*, 148 U. S. 197, the court said (p. 202):

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States* v. *Hess*, 124 U. S. 483 (31:516). And in *Britton* v. *United States*, 108 U. S. 199 (27:698), it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy."

In the case of *United States* v. *Britton*, 107 U. S. 655, this court, after citing and approving *United States* v. *Simmons* and other cases herein cited, said:

> "In the case of *U. S.* v. *Pond*, 2 Curt. (C. C.) 265, the rule was thus stated by Mr. Justice Curtis: 'It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offense in the words of the statute, *unless they embrace cases which it was* not the intention of the Legislature to include *within the law*. If they do, the indictment should show that this is not one of the cases thus excluded.'" (Italics ours.)

In *Fontana* v. *United States*, 262 Fed. 283, the Circuit Court of Appeals of the Eighth Circuit said:

> "The basic principle of English and American jurisprudence is that no man shall be deprived of

life, liberty or property without due process of law; and notice of the charge or claim against him not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts upon which the pleader founds his charges, and it is a fundamental that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleadings. *Miller* v. *U. S.*, 133 Fed. 337, 341, 66 C. C. A. 399, 403; *Naftzger* v. *United States*, 200 Fed. 494, 502, 118 C. C. A. 598, 604.

It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. *United States* v. *Britain*, 107 U. S. 665, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; *U. S.* v. *Hess*, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; *Miller* v. *U. S.*, 133 Fed. 337, 341, 66 C. C. A. 399, 403; *Armour Pkg. Co.* v. *U. S.*, 153 Fed. 1, 16, 17; 82 C. C. A. 135, 150, 151, 14 L. R. A. (N. S.) 400; *Ethridge* v. *U. S.*, 186 Fed. 434, 108 C. C. A. 356; *Winters* v. *U. S.*, 201 Fed. 845, 848, 120 C. C. A. 175, 178; *Horn* v. *U. S.*, 182 Fed. 721, 722, 105 C. C. A. 163, 167."

It is respectfully submitted that under all these authorities that the allegation, that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue, is not sufficient to charge that defendant was a person required to be registered and to pay the tax under Section 1. The allegations are distinct and dissimilar and no implication can arise from the fact that the sale was made not on a written order, on a form issued in blank for that purpose by the Commissioner of Internal Revenue, that defendant was a person required to register and pay the special tax under Section 1, or had registered under said Section.

Respectfully submitted,

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*Attorneys for Plaintiff in Error.*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction of this Court | 1 |
| Questions certified | 1 |
| Statutes | 2 |
| Statement | 3 |
| Summary of argument | 6 |
| Argument: | |
| I. The prohibition contained in Section 2 of the Narcotic Act against selling, bartering, exchanging, or giving away drugs, except in pursuance of an order form, is not limited to persons required to register, but applies to "any person" | 7 |
| II. Section 2, broadly construed, is not unconstitutional | 14 |
| III. If the provisions of Section 2 are limited to persons required to register, it would be necessary to allege and prove defendant was such a person | 19 |
| IV. The bare allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue, is not a sufficient charge that defendant was a person required to register | 20 |
| Conclusion | 21 |
| Appendix | 23 |


## CITATIONS


| Cases: | |
|---|---|
| *Alston* v. *United States*, 274 U. S. 289 | 15, 17 |
| *Casey* v. *United States*, No. 500, Oct. Term, 1927 | 8 |
| *Coleman* v. *United States*, 3 F (2d) 243 | 10 |
| *Fyke* v. *United States*, 254 Fed. 225 | 9 |
| *O'Neill* v. *United States*, 19 F. (2d) 322 | 8 |
| *Smith* v. *United States*, 17 F. (2d) 723 | 19 |
| *United States* v. *Balint*, 258 U. S. 250 | 16 |
| *United States* v. *Doremus*, 249 U. S. 86 | 15, 16 |
| *United States* v. *Jin Fuey Moy*, 241 U. S. 394 | 10, 11 |
| *United States* v. *Northway*, 120 U. S. 327 | 20 |
| *United States* v. *Wong Sing*, 260 U. S. 18 | 20 |
| *United States* v. *Woods*, 224 Fed. 278 | 20 |
| *Watson* v. *United States*, 16 F. (2d) 52 | 19, 21 |
| *Weaver* v. *United States*, 15 F. (2d) 38 | 8 |

Statutes: Page

Narcotic drugs import and export act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the act of January 17, 1914, c. 9, 38 Stat. 275, and as amended by the act of May 26, 1922, c. 202, 42 Stat. 596 ---- 3, 42

Harrison Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785 ---- 3, 23

Revenue Act of 1918, c. 18, Sec. 1006, 40 Stat. 1057, 1130, amending the Harrison Act ---- 3, 35

International Opium Convention signed at The Hague, January 23, 1912, 38 Stat., pt. 2, p. 1929 ---- 3, 49

Miscellaneous:

Presidential message to the Senate of February 21, 1910 -- 3, 78

Corpus Juris, Vol. 31, Par. 240, pp. 694, 695 ---- 20

Government report on the traffic in opium and other dangerous drugs for the year ending June 30, 1926 ---- 3, 62

Extract from brief for United States in *Alston case* ---- 3, 87

# In the Supreme Court of the United States

OCTOBER TERM, 1927

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No. 600

FRANK NIGRO

*v.*

UNITED STATES OF AMERICA

---

*ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

As the case comes here on certificate from the Circuit Court of Appeals, no opinion was rendered below.

### JURISDICTION OF THIS COURT

The jurisdiction of this Court to answer the questions certified by the Circuit Court of Appeals is conferred by the Act of February 13, 1925.

### QUESTIONS CERTIFIED

The Circuit Court of Appeals certifies four questions, as follows (R. 5):

QUESTION I

Is the provision which is contained in the first sentence of Section 2 of the Act limited in its application to those persons who by Section 1 are required to register and pay the tax?

QUESTION II

If a broader construction is given to said provision, is the provision as so construed, constitutional?

If question I is answered in the affirmative, then we ask

QUESTION III

Is it necessary for the Government in prosecuting under said provision, to allege and prove that defendant was a person required by Section 1 to register and pay the tax?

If question III is answered in the affirmative, then we ask

QUESTION IV

Is the allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, sufficient to charge that defendant was a person required to be registered and to pay the tax under Section 1?

**STATUTES**

The provision of the Harrison Narcotic Act directly in question is the first sentence in Section 2, which reads as follows:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

The appendix contains (pp. 23–48) a copy of the Harrison Act as originally enacted December 17, 1914, c. 1, 38 Stat. 785, and Section 1006 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1130, which amended the original Act (U. S. C. Title 26, Secs. 211 and 691 et seq.); the Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275, and as amended by the Act of May 26, 1922, c. 202, 42 Stat. 596; U. S. C. Title 21, Secs. 171 et seq. The appendix also contains (pp. 49–86) the International Opium Convention signed at The Hague January 23, 1912 (38 Stat., Pt. 2, p. 1929), and portions of a report by the Government of the United States on the traffic in drugs for the year ended June 30, 1926, and a Message from the President on the subject transmitted February 21, 1910.

## STATEMENT

The facts are thus stated by the Circuit Court of Appeals (R. 3):

> For the purpose of certification, we state the facts as follows, and we have regarded as facts whatever the evidence fairly tended to show in aid of the prosecution:

About 5 P. M. February 23, 1926, Raithel, a United States narcotic agent, and Knudtson, an addict informer, visited a barber shop at 311 E. 6th Street, Kansas City, Missouri. Raithel remained in the front part of the shop while Knudtson went to the back part, where he had a talk with defendant. After a few minutes Raithel and Knudtson left. About 7 P. M. they returned. Defendant was there. Knudtson introduced Raithel to defendant. Knudtson then said to defendant, "How's everything?" Defendant said, "All right." Knudtson said, "Well, can we get an ounce of M?" Defendant called out "Roy"; and a negro boy came up. Defendant then said, "It will cost you $70. Give me the money and I will go with him, go with this boy and see that you get a full ounce, or that you get a square deal." Knudtson produced $50, which he handed to Raithel. Raithel produced $20; and handed the $70 to defendant. Defendant said, "I will go with him (the boy) to see that it is all right and if it isn't I will give you your money back." Defendant and the boy left the building. Raithel and Knudtson remained. After a short time, defendant and the boy returned; the boy passed Raithel and Knudtson and went down into the basement of the building. Knudtson followed the boy. Defendant said to Raithel, "Go on, look it over; I want you to see that it is all right." Raithel then went to the basement. The boy produced from his clothing an ounce can of morphine, and said, "Look it over." Rai-

thel and Knudtson examined it, and Raithel put it in his pocket. The boy said, "Any time you want anything, just come down." Raithel said, "Who will we ask for?" The boy said, "Roy." Raithel said, "Roy who?" The boy said, "Oh, Williams will do." Raithel and Knudtson said, "All right"; and all three went upstairs from the basement. Defendant was standing by the stove. He said, "How's everything?" Raithel and Knudtson said, "All right." Defendant said, "All right, come back any time." Raithel and Knudtson left.

Neither Knudtson nor defendant testified, and the negro boy was not produced.

There was no allegation in the count under discussion that defendant was a dealer as defined in the act; no allegation that defendant was one of the class of persons enumerated in Section 1 of the Act who are required to register and pay the tax. There was no evidence touching these matters. There was no direct testimony that a form order signed by the purchaser was not given to defendant. There was no allegation in the count whether or not the sale was made in or from an original stamped package, and there was no evidence touching this matter.

Defendant by demurrer challenged the sufficiency of the count for the lack of such allegations; and at the close of the case moved for a directed verdict on the ground that the evidence wholly failed to show the commission of any offense.

## SUMMARY OF ARGUMENT

The words "any person," in the first sentence in Section 2, should be construed to include any person who sells drugs, whether or not a registered dealer, and to forbid any vendor, registered or unregistered, to sell drugs to one who does not present an order on the prescribed form. That is the literal interpretation, and the purpose of the order-form provisions, which is supervision of all transactions in drugs, would be in part defeated by a narrower interpretation.

Broadly construed, the section presents no greater constitutional difficulty than if narrowly construed. The constitutional question which arises under the order-form provisions of the Harrison Act is present in either case.

The order-form provisions are not invalid. They serve to keep the traffic above board and to aid in enforcement of the occupation-tax and stamp-tax provisions. As held in the *Doremus case*, they so operate. That they incidentally have the effect of hindering abnormal use of narcotics should not make them invalid.

When the *Doremus case* was decided, the Act imposed only an annual occupation tax of one dollar. Its character as a genuine revenue measure was open to doubt. The amendments of 1918, imposing substantial occupation taxes and adding the stamp tax, and the substantial revenues now derived therefrom, mark the present statute as a revenue measure.

The order-form provisions were sustained many years ago, the traffic in narcotics presents an unique situation, and whatever doubt exists as to the validity of these provisions should now be finally resolved in favor of their validity.

The proper answers to the remaining questions are obvious.

## ARGUMENT

### I

### THE PROHIBITION CONTAINED IN SECTION 2 OF THE NARCOTIC ACT AGAINST SELLING, BARTERING, EXCHANGING, OR GIVING AWAY DRUGS, EXCEPT IN PURSUANCE OF AN ORDER FORM, IS NOT LIMITED TO PERSONS REQUIRED TO REGISTER, BUT APPLIES TO "ANY PERSON"

The first question is whether the words "any person" in the first sentence of Section 2 of the Harrison Act, which makes it unlawful for any person to sell drugs except on a written order from the person to whom the article is sold, on a form issued by the Commissioner of Internal Revenue, include vendors not required to register as well as those who are. The question arises under the second count of the indictment, which charged a sale to a purchaser who did not furnish a written order on the established form. This count did not allege that the plaintiff in error, who was a vendor, had been registered or was a person required to register, and we infer there was no evidence to show that the vendor was a dealer in stamped drugs. Section 1 of the Act expressly provides that the dealers, wholesale or retail, required to register and pay the occupa-

tion tax are those who sell drugs in or from stamped packages, and no registration or payment of occupation tax is required by a dealer who only sells drugs not in or from stamped packages. See *O'Neill* v. *United States,* 19 F. (2d) 322; *Weaver* v. *United States,* 15 F. (2d) 38; *Casey* v. *United States,* No. 500, October Term, 1927 (argued with this case).

The question here is whether a vendor who does not sell in or from stamped packages and who is therefore not required to register and pay the occupation tax, and whose sale of the drug is in itself an offense, because not in or from a stamped package, is also violating the provision requiring every vendor to exact a written order from his vendee, where the sale is made without the purchaser furnishing such an order on the prescribed form.

As the Act was originally enacted in 1914 it contained no stamp tax provision. The only taxes prescribed were the occupation taxes on importers and dealers. It required every person selling or dealing in the drug, without regard to any stamp tax or stamped package, to register and pay the occupation tax, and the words "any person" in the first sentence in Section 2 as originally enacted clearly provided that every person selling the drug should exact the order form from the purchaser without regard to whether or not the vendor was in fact registered. The stamp tax provisions of Section 1 were added by the Revenue Act of 1918, and the registration and occupation tax provisions in Section 1 were then amended so as to

provide that only those who deal at wholesale or retail in or from original stamped packages are required to register and pay the dealer's occupation tax. For the first time there were created two classes of dealers—those who sell in or from stamped packages and are required to register and pay the occupation tax, and those who sell only in or from unstamped packages, every sale by whom is a violation of the stamp-tax provisions, and who are not required to register.

No change was made in Section 2, and there is no reason to believe that Congress intended that a restricted meaning should be given to Section 2 as a result of the amendments to Section 1.

Prior to the amendment of 1918 the words "any person" in Section 2 had been literally construed to apply to sales by any person whether registered or not. *Fyke* v. *United States,* C. C. A., 5th Circuit, 254 Fed. 225. It was there said (p. 227):

> It was, therefore, clearly competent for Congress to punish the unlawful sale of the prohibited drugs by all classes of persons, those actually registered and those not. All sellers were members of the class required to register and pay the tax, under section 1, and the revenue derived from sellers, as provided for by that section, could manifestly not be collected unless Congress had the power to, and did in fact, punish the sale of the prohibited drugs by all persons except when made in conformity to the act. The necessity of prohibiting sales by unregistered per-

> sons and of sales by registered persons, not complying with the act, were of equal importance. If only the latter class were subject to its penalties, all persons, by failing to register, could sell with impunity, without paying the tax or complying with the other requirements of the act.

Section 2 had been so generally applied in other cases. When overhauling the Harrison Act by the amendments of 1918 Congress made no change in Section 2. It should be presumed to have acquiesced in the construction which had been placed upon it.

In *Coleman* v. *United States,* 3 F. (2d) 243, the Circuit Court of Appeals for the Ninth Circuit passed on the sufficiency of an indictment which charged a sale of morphine not in pursuance of a written order on the form prescribed by the Commissioner, without any allegation that the vendor was registered or required to register, and it was held that the indictment was sufficient and the provision making it unlawful for a vendor to sell without exacting a written order from the buyer on the prescribed form applied to those not registered or required to register as well as to those who are.

The words "any person" are all inclusive, and to limit their application to those registered or required to register under Section 1 is to read into the Act words not found there.

The case of *United States* v. *Jin Fuey Moy,* 241 U. S. 394, construing Section 8 of the Harrison Act,

is not controlling. The words construed there were "any person not registered under the provisions of this Act and who has not paid the special tax," and it was held that the reference to registration raised an inference that the section dealt with those required to register. The first sentence in Section 2 here under consideration relates to "any person," and the absence of the words "not registered under the provisions of this Act" presents a different case from that dealt with in the *Jin Fuey Moy* decision.

Section 2 and Section 8 are in the same Act, and were enacted at the same time, and the omission in Section 2 of the qualifying words found in Section 8 is in itself significant, and calls for a distinction.

The purpose of the order-form provisions of the Act was to keep the traffic above board and enable the United States to observe all transactions in drugs. Looked at as an aid to enforcement of the two tax provisions of the statute, one imposing an occupation tax and the other a stamp tax, the purpose of the Act is defeated if a purchaser of drugs from an unregistered dealer is not required to furnish the prescribed order form. The purchaser may be himself one who should register, but has not registered, or the purchaser may be one dealing in or selling drugs on which the stamp tax has not been paid, and it is just as important from the standpoint of supervising the traffic that sales by an unregistered dealer are criminal unless made in pursuance of a written order on the prescribed

form as that sales by registered dealers should be so recorded.

So far as the mere matter of punishing the vendor is concerned, it is not of much practical importance which construction be placed upon this provision in Section 2, because all persons vending tax-paid drugs are required to register, and anyone who vends drugs in or from unstamped packages violates the clause in Section 1 making such sales criminal offenses. If the vendor escapes conviction on the charge of selling without a written order on the ground that he is not required to register, it must be because all the drugs he sells are unstamped, and the very fact that exonerates him from registering or exacting the order form convicts him of violation of the stamp-tax provisions. The broader construction of the first sentence in Section 2 is important in the matter of supervising the traffic and observing the drugs in the hands of the purchaser and ascertaining whether the purchaser is violating either the registration and occupation-tax provisions or the stamp-tax provisions of the Act.

It should be noted that the question here is not whether the purchaser was registered or required to register. It is whether the vendor was one registered or required to register. The purchaser may or may not be one required to register. An unregistered dealer may sell to a registered dealer who has order forms, but may not be required to use them if the vendor does not exact their use.

Making it incumbent on the vendor, whether registered or not, to exact a written order on the prescribed form from the purchaser serves the purpose of the statute in enabling public authorities to observe the disposition of the drug by the purchaser and to enforce the registration, occupation tax, and stamp-tax provisions of the Act.

Naturally, the question arises whether the broader construction encounters constitutional difficulties and brings into application the rule that grave constitutional questions should be avoided by interpretation if reasonably possible. The Circuit Court of Appeals, by Question 2, suggests that Section 2 construed to require unregistered dealers to exact order forms may present constitutional difficulties which the section would not present if given the narrower interpretation requiring only those dealing in stamped packages and registered as dealers to exact the order form from their customers.

We are unable to see how any constitutional difficulty is presented by the broader construction which is not present under the narrower one. If Congress has power to require vendors to decline to sell to anyone not producing a written order on a prescribed form if has power to require those not registered, as well as those registered, to follow this practice. The constitutional question involved in the order-form provisions of the Harrison Act is present whichever way this provision of Section 2 be construed, and the attack which has been made

on the order-form provisions is grounded on the fact that, taken as a whole, because of the provision that only legitimate dealers are furnished with the forms, they have a tendency to prevent the drug passing into the hands of addicts or persons not having legitimate use for it; and it has been claimed that, to this extent, the Act infringes on the reserved power of the States. The presence of that constitutional question does not depend upon whether the first sentence in Section 2 is limited to registered vendors or applies to unregistered vendors. The way the questions are certified, if the narrower construction is adopted, it will not be necessary to answer the constitutional question, because the Circuit Court of Appeals has not asked that it be answered unless the broader interpretation is adopted. It does not seem, therefore, that the interpretation of the first sentence in Section 2 should be influenced by the supposed presence of grave constitutional questions, because whatever constitutional questions exist are there without regard to the way the section is interpreted.

## II

### SECTION 2, BROADLY CONSTRUED, IS NOT UNCONSTITUTIONAL

As has just been pointed out, whatever constitutional question there is in respect of the validity of the order form provisions is present whether the narrower or the broader construction be placed on

Section 2, but it only need be answered on this certificate if the broader interpretation be adopted.

As was pointed out in the brief of the United States in *Alston* v. *United States,* 274 U. S. 289, the provisions of the Act imposing stamp taxes are valid; those involving occupation taxes are valid, and the provisions making it unlawful to purchase or sell unstamped drugs or to deal in stamped drugs without registering or paying the occupation tax are clearly valid. In that case the validity of the order form provisions of Section 2 was argued and dealt with in the briefs, but the Court dealt with Section 1 alone and sustained its provisions. The order form provisions of Section 2 were sustained in *United States* v. *Doremus,* 249 U. S. 86, where this Court said (pp. 94, 95):

> * * * The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without

> paying the tax imposed by the federal law. * * *
>
> We cannot agree with the contention that the provisions of § 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. * * *

Of these provisions it was said, in *United States* v. *Balint*, 258 U. S. 250, 253:

> Section 2 of the Narcotic Act, 38 Stat. 786, we give in part in the margin. It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. * * *

The *Doremus case* dealt with the statute as originally enacted and sustained it as a revenue measure, although the only tax imposed by it was an annual occupation tax on purchasers, importers, and dealers of $1 each, and the revenues derived were obviously nominal, and the Act was attacked as not a genuine revenue measure. By the amendments of 1918 this weakness of the Act was repaired.

The occupation taxes were made substantial, and, in addition, the stamp tax on the drugs at the rate of one cent an ounce or any fraction thereof was added. At the time of the argument of the *Alston case* it was developed that these tax provisions produce substantial revenue and that the Act, as a whole, could be sustained as a genuine tax measure. That the order form provisions are now genuinely calculated to enable the United States to keep the traffic aboveboard, for the purpose of enforcing the occupation and stamp tax provisions, is evident. It is true that the provision forbidding all but registered dealers to obtain the order forms has the incidental effect of preventing the drug reaching those who have not a normal and legitimate use for it, but its use by those who do not obtain order forms or legitimate medical prescriptions is abnormal, and the effect in restraining such use should not render the order form provisions void as an infringement on State police power, where the provisions are genuinely calculated to sustain the revenue features. This feature of the statute does approach closely to the line between validity and invalidity, but it was once sustained by this Court many years ago with less reason than now exists under the amended statute; its provisions have been enforced for many years; the situation presented by this statute and the traffic in narcotic drugs is unique, and whatever doubts exist

or have existed respecting the validity of the order form provisions of the Act should, in the light of all these conditions, be finally resolved in favor of their validity.

Here, again, as was done in the brief in the *Alston case,* we call attention to the fact that the Harrison Act is one of several legislative enactments constituting part of the same general plan for dealing with the drug traffic. The order form provisions, enabling the public officials to keep track of all sales and dealings in drugs, furnish material for the Narcotic Control Board, under the Narcotic Drugs Import and Export Act, to enable it to determine what quantities are legitimately used and need to be imported for legitimate uses. And if the argument in support of the validity of the order form provisions as reasonable means for enforcing the revenue features of the Harrison Act is rejected, and the Court thus reexamines the decision reached in the *Doremus case,* there still remains the question whether the International Opium Convention dealt with an appropriate subject of international agreement, and whether domestic legislation agreed to be enacted in execution of the treaty, and found in the Harrison Act, is germane to the subject of the treaty, and is reasonably calculated to aid in solving the international problem to which the treaty relates. Argument on this point contained in the brief for the United States in the *Alston case* is reproduced at pages 87–93 of the appendix hereto.

## III

### IF THE PROVISIONS OF SECTION 2 ARE LIMITED TO PERSONS REQUIRED TO REGISTER, IT WOULD BE NECESSARY TO ALLEGE AND PROVE DEFENDANT WAS SUCH A PERSON

The third certified question inquires whether, if the provisions of Section 2 here under consideration are restricted to persons who are required to register, it is necessary to allege and prove that defendant was such a person.

If Section 2 is to be interpreted as though it read, "any person required to register under the terms of this Act," as does one paragraph of Section 1, then it would seem to be necessary that the indictment should charge the defendant with being such a person. *Smith* v. *United States,* 17 F. (2d) 723, 724, is in point. In that case one count of the indictment was founded upon Section 8 of the Act which is limited to persons required to register. The court said:

> The failure to charge that she was a person required by law to register is fatal. *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402, 36 S. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; *Franklin* v. *Biddle,* 5 F. (2d) 19, 21, decided by this court; *Swartz* v. *United States,* 280 F. 115 (C. C. A. 5). The demurrer to that count should have been sustained.

In *Watson* v. *United States,* 16 F. (2d) 52, 53, which is like the case at bar, the court assumed that such an allegation was required. The court held, however, that the facts set forth in the indictment

there considered were "sufficient to charge that the defendant was a person whose act required him to register."

The applicable rule is thus well stated in *United States* v. *Woods,* 224 Fed. 278, 280:

> * * * Whenever an offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective in substance; for lacking such allegation, all alleged may be true, and accused be innocent. * * *

See also 31 *Corpus Juris,* pp. 694–695, par. 240, and *United States* v. *Northway,* 120 U. S. 327, 333.

It was the application of the above rule that started the *Wong Sing case* to this Court (260 U. S. 18, 20).

If Section 2 can not be violated except by those required to register, then it seems to follow that the indictment must allege that defendant is such a person, and it would then be incumbent upon the Government to prove such allegation at the trial.

## IV

### THE BARE ALLEGATION THAT DEFENDANT MADE THE SALE NOT IN PURSUANCE OF A WRITTEN ORDER OF THE BUYER ON A FORM ISSUED IN BLANK FOR THAT PURPOSE BY THE COMMISSIONER OF INTERNAL REVENUE, IS NOT A SUFFICIENT CHARGE THAT DEFENDANT WAS A PERSON REQUIRED TO REGISTER

The charging part of count 2 of the indictment here involved, is thus quoted in the certificate of the Circuit Court of Appeals (R. 2):

> that * * * one Frank Nigro and one Roy Williams did unlawfully, wilfully, knowingly and feloniously sell to a certain person, to-wit, to one A. L. Raithel a certain quantity of a derivative of opium, to-wit, one ounce of morphine, the said derivative of opium so sold as aforesaid, not being then and there sold in pursuance of a written order of the said A. L. Raithel on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States * * *.

In *Watson* v. *United States,* 16 F. (2d) 52, 53, the Circuit Court of Appeals for the Ninth Circuit upheld its prior ruling that an indictment which charged defendant with having unlawfully, willfully, and knowingly sold, dispensed, and distributed a derivative of opium, "sufficiently alleged that defendant was a person required to register." Inasmuch as the Harrison Act only requires those who deal in stamped drugs to register, and the indictment just quoted did not even allege that the drugs were stamped, the soundness of the court's ruling may at least be open to question. In any event the Government would not be justified in urging that the allegations in the indictment at bar were equivalent to a charge that defendant belonged to the class of persons required to register.

## CONCLUSION

It is respectfully submitted that the first question certified should be answered in the negative, and the second in the affirmative, in which event it will

be unnecessary for this Court to answer questions three and four. If question one, however, should be answered in the affirmative, then question two needs no answer, and question three should be answered in the affirmative and question four in the negative.

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JANUARY, 1928.

# APPENDIX

## THE HARRISON ACT AS ORIGINALLY ENACTED DECEMBER 17, 1914

### CHAPTER 1

An Act To provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That on and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: *Provided,* That the office, or if none, then the residence of any person shall be considered for the purposes of this Act to be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of $1 per annum: *Provided,* That no employee of any person who produces, imports, manufactures, compounds, deals in,

dispenses, sells, distributes, or gives away any of the aforesaid drugs, acting within the scope of his employment, shall be required to register or to pay the special tax provided by this section: *Provided further,* That the person who employs him shall have registered and paid the special tax as required by this section: *Provided further,* That officers of the United States Government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the Public Health Service, and for Government hospitals and prisons, and officers of any State government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for State, county, or municipal hospitals or prisons, and officials of any Territory or insular possession or the District of Columbia or of the United States who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein shall not be required to register and pay the special tax as herein required.

It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section.

That the word "person" as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, so far as applicable, including the provisions of section thirty-two hundred and forty of the Revised Statutes of the

United States are hereby extended to the special tax herein imposed.

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect.

SEC. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof, shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician,

dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided,* That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

(c) To the sale, exportation, shipment, or delivery of any of the aforesaid drugs by any person within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof

into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial district, county, or municipal or insular hospitals or prisons.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but shall not exceed the sum of $1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or

stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

The provisions of this Act shall apply to the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone. In Porto Rico and the Philippine Islands the administration of this Act, the collection of the said special tax, and the issuance of the order forms specified in section two shall be performed by the appropriate internal-revenue officers of those governments, and all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively. The courts of first instance in the Philippine Islands shall possess and exercise jurisdiction in all cases arising under this Act in said islands. The President is authorized and directed to issue such Executive orders as will carry into effect in the Canal Zone the intent and purpose of this Act by providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give

away opium or coca leaves, their salts, derivatives, or preparations.

SEC. 3. That any person who shall be registered in any internal-revenue district under the provisions of section one of this Act shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal-revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received.

SEC. 4. That it shall be unlawful for any person who shall not have registered and paid the special tax as required by section one of this Act to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, to any person in any other State or Territory or the District of Columbia or any insular possession of the United States: *Provided*, That nothing contained in this section shall apply to common carriers engaged in transporting the aforesaid drugs, or to any employee acting within the scope of his employment, of any person who shall have registered and paid the special tax as required by section one of this Act, or to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, or veterinarian required to register under the terms of this Act, who has been employed to prescribe for

the particular patient receiving such drug, or to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

SEC. 5. That the duplicate-order forms and the prescriptions required to be preserved under the provisions of section two of this Act, and the statements or returns filed in the office of the collector of the district, under the provisions of section three of this Act, shall be open to inspection by officers, agents, and employees of the Treasury Department duly authorized for that purpose; and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs. Each collector of internal revenue is hereby authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in his office to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States, as shall be entitled to inspect the said statements or returns filed in the office of the said collector, upon the payment of a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested. Any person who shall disclose the information contained in the said statements or returns or in the said duplicate-order forms, except as herein expressly provided, and except for the purpose of enforcing the provisions

of this Act, or for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs, shall, on conviction, be fined or imprisoned as provided by section nine of this Act. And collectors of internal revenue are hereby authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in their respective collection districts as special-tax payers under the provisions of this Act, upon payment of a fee of $1 for each one hundred names or fraction thereof in the copy so requested.

SEC. 6. That the provisions of this Act shall not be construed to apply to the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations are sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions

and provisions of this Act. The provisions of this Act shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.

SEC. 7. That all laws relating to the assessment, collection, remission, and refund of internal-revenue taxes, including section thirty-two hundred and twenty-nine of the Revised Statutes of the United States, so far as applicable to and not inconsistent with the provisions of this Act, are hereby extended and made applicable to the special taxes imposed by this Act.

SEC. 8. That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: *Provided,* That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this Act; or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding pos-

session for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: *Provided further,* That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.

SEC. 9. That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

SEC. 10. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to appoint such agents, deputy collectors, inspectors, chemists, assistant chemists, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia as may be necessary to enforce the provisions of this Act.

SEC. 11. That the sum of $150,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purpose of carrying into effect the provisions of this Act.

SEC. 12. That nothing contained in this Act shall be construed to impair, alter, amend, or repeal any of the provisions of the Act of Congress approved June thirtieth, nineteen hundred and six, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded, or poisonous, or deleterious foods, drugs, medicines,

and liquors, and for regulating traffic therein, and for other purposes," and any amendment thereof, or of the Act approved February ninth, nineteen hundred and nine, entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," and any amendment thereof.

Approved, December 17, 1914.

THE AMENDMENT BY THE REVENUE ACT OF 1918 TO THE HARRISON ACT, WHICH ADDED THE STAMP TAX PROVISIONS

SEC. 1006. That section 1 of the Act of Congress approved December 17, 1914, is hereby amended to read as follows:

"SECTION 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided;

"Every person who on January 1, 1919, is engaged in any of the activities above enumerated, or who between such date and the passage of this Act first engages in any of such activities, shall within 30 days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919; and

"Every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th;

"Importers, manufacturers, producers, or compounders, $24 per annum; wholesale dealers, $12

per annum; retail dealers, $6 per annum; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, shall pay $3 per annum.

"Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.

"Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

"Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: *Provided*, That the office, or if none, the residence, of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: *Provided further*, That officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter prescribed, but their right to this exemption shall be evidenced in such manner as the Commissioner of Internal Revenue, with the ap-

proval of the Secretary of the Treasury, may by regulations prescribe.

"It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

"That the word 'person' as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section.

"That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

"The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided,* That the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this Act; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept, as required by this Act

of the drugs so dispensed, administered, distributed, or given away.

"And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section.

"That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed.

"Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require.

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect."

SEC. 1007. That section 6 of such Act of December 17, 1914, is hereby amended to read as follows:

"SEC. 6. That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain

more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided,* That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: *Provided further,* That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of $1 for each

year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine."

## THE NARCOTIC DRUGS IMPORT AND EXPORT ACT

[The Act of February 9, 1909, as amended by the Act of January 17, 1914, entitled "An Act to amend an Act entitled 'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February 9, 1909," as amended by the Act of May 26, 1922]

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,*

(SEC. 1.) That when used in this Act—

(a) The term "narcotic drug" means opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine;

(b) The term "United States," when used in a geographical sense, includes the several States and Territories and the District of Columbia.

(c) The term "board" means the Federal Narcotics Control Board established by section 2 of this Act; and

(d) The term "person" means individual, partnership, corporation, or association.

SEC. 2. (a) That there is hereby established a board to be known as the Federal Narcotics Control Board and to be composed of the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce. Except as otherwise provided in this Act or by other law, the administration of this Act is vested in the Department of the Treasury.

(b) That it is unlawful to import or bring any narcotic drug into the United States or any terri-

tory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the board shall prescribe. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.

(d) Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 3075 and 3076 of the Revised Statutes, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for con-

demnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivison, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," or provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections.

(f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

(g) The master of any vessel or other water craft, or a person in charge of a railroad car or other vehicle, shall not be liable under subdivision (c), if he satisfies the jury that he had no knowledge of and used due diligence to prevent the presence of the narcotic drug in or on such vessel, water craft, railroad car, or other vehicle; but the narcotic drug shall be seized, forfeited, and disposed of as provided in subdivision (d).

SEC. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or

opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.

SEC. 4. That any person subject to the jurisdiction of the United States who shall, either as principal or as accessory, receive or have in his possession, or conceal on board of or transport on any foreign or domestic vessel or other water craft or railroad car or other vehicle destined to or bound from the United States or any possession thereof, any smoking opium or opium prepared for smoking, or who, having knowledge of the presence in or on any such vessel, water craft, or vehicle of such article shall not report the same to the principal officer thereof, shall be subject to the penalty provided in section 2 of this Act. Whenever on trial for violation of this section the defendant is shown to have or to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury: *Provided, however,* That any master of a vessel or other water craft, or person in charge of a railroad car or other vehicle, shall not be liable under this section if he shall satisfy the jury that he had no knowledge and used due diligence to prevent the presence of such article in or on such vessel, water craft, car, or other vessel, and any such article shall be forfeited and shall be destroyed.

SEC. 5. That no smoking opium or opium prepared for smoking shall be admitted into the United

States or into any territory under its control or jurisdiction for transportation to another country, or be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or for any other purpose; and, except with the approval of the board, no other narcotic drug may be so admitted, transferred, or transshipped.

SEC. 6. (a) That it shall be unlawful for any person subject to the jurisdiction of the United States Government to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any narcotic drug to any other country: *Provided,* That narcotic drugs (except smoking opium and opium prepared for smoking, the exportation of which is hereby absolutely prohibited) may be exported to a country only which has ratified and become a party to the convention and final protocol between the United States Government and other powers for the suppression of the abuses of opium and other drugs, commonly known as the International Opium Convention of 1912, and then only if (1) such country has instituted and maintains, in conformity with that convention, a system, which the board deems adequate, of permits or licenses for the control of imports of such narcotic drugs; (2) the narcotic drug is consigned to an authorized permittee; and (3) there is furnished to the board proof deemed adequate by it that the narcotic drug is to be applied exclusively to medical and legitimate uses within the country to which exported, that it will not be reexported from such country, and that there is an actual short-

age of and a demand for the narcotic drug for medical and legitimate uses within such country.

(b) The Secretary of State shall request all foreign Governments to communicate through the diplomatic channels copies of the laws and regulations promulgated in their respective countries which prohibit or regulate the importation and shipment in transit of any narcotic drug and, when received, advise the board thereof.

(c) The board shall make and publish all proper regulations to carry into effect the authority vested in it by this Act.

SEC. 7. That any person who exports or causes to be exported any of the aforesaid drugs in violation of the preceding section shall be fined in any sum not exceeding $5,000 nor less than $50, or by imprisonment for any time not exceeding two years, or both. And one-half of any fine recovered from any person or persons convicted of an offense under any section of this Act may be paid to the person or persons giving information leading to such recovery, and one-half of any bail forfeited and collected in any proceedings brought under this Act may be paid to the person or persons giving the information which led to the institution of such proceedings if so directed by the court exercising jurisdiction in the case: *Provided,* That no payment for giving information shall be made to any officer or employee of the United States.

SEC. 8. (a) That a narcotic drug that is found upon a vessel arriving at a port of the United States or territory under its control or jurisdiction and is not shown upon the vessel's manifest, or that is landed from any such vessel without a permit

81004—28——4

first obtained from the collector of customs for that purpose, shall be seized, forfeited, and disposed of in the manner provided in subdivision (d) of section 2, and the master of the vessel shall be liable (1) if the narcotic drug is smoking opium, to a penalty of $25 an ounce, and (2) if any other narcotic drug, to a penalty equal to the value of the narcotic drug.

(b) Such penalty shall constitute a lien upon the vessel which may be enforced by proceedings by libel in rem. Clearance of the vessel from a port of the United States may be withheld until the penalty is paid, or until there is deposited with the collector of customs at the port, a bond in a penal sum double the amount of the penalty, with sureties approved by the collector, and conditioned on the payment of the penalty (or so much thereof as is not remitted by the Secretary of the Treasury) and of all costs and other expenses to the Government in proceedings for the recovery of the penalty, in case the master's application for remission of the penalty is denied in whole or in part by the Secretary of the Treasury.

(c) The provisions of law for the mitigation and remission of penalties and forfeitures incurred for violation of the customs laws shall apply to penalties incurred for a violation of the provisions of this section.

SEC. 9. That this Act may be cited as the "Narcotic Drugs Import and Export Act."

His Majesty the German Emperor, King of Prussia in the name of the German Empire; The President of the United States of America; His Majesty the Emperor of China; The President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Imperial Majesty the Shah of Persia; the President of the Portuguese Republic; His Majesty the Emperor of All the Russias; His Majesty the King of Siam

being desirous to take one step further in the way marked out by the International Commission at Shanghai in 1909;

resolved to pursue progressive suppression of the abuse of opium, morphine, cocaine as well as drugs prepared or derived from these substances giving rise or which may give rise to analogous abuses;

taking into consideration the necessity and the mutual profit of an international understanding on this point;

being convinced that they will meet in this humanitarian effort the unanimous adhesion of all the nations interested,

have resolved to conclude a Convention for this purpose and have appointed as their Plenipotentiaries, to wit:

[Here follows a list of the names.]

## Chapter I

### *Raw opium*

*Definition.*—By raw opium shall be understood:

The spontaneously coagulated sap obtained from capsules of the soporific poppy (Papaver somniferum), and which shall not have been subjected to any but the processes necessary to the packing and the transportation thereof.

#### Article 1

The Contracting Powers shall enact efficacious laws or regulations for the control of the production and distribution of raw opium, unless existing laws or regulations have already regulated the matter.

#### Article 2

The Contracting Powers, taking into account the differences in their trade conditions, shall limit the number of towns, ports, or other places through which the importation or exportation of raw opium shall be permitted.

#### Article 3

The Contracting Powers shall take measures:

*a.* to prevent the exportation of raw opium to countries which shall have prohibited the entry thereof, and

*b.* to control the exportation of raw opium to countries which shall have limited the importation thereof,

Unless existing measures have already regulated the matter.

Article 4

The Contracting Powers shall issue regulations to provide that every package containing raw opium destined for exportation shall be marked in such a manner as to indicate its contents, providing the consignment shall exceed 5 kilograms.

Article 5

The Contracting Powers shall not permit the importation and exportation of raw opium except through duly authorized persons.

## Chapter II

### *Prepared opium*

*Definition.*—By prepared opium shall be understood:

The product of raw opium obtained by a series of special processes, particularly by dissolution, boiling, heating and fermentation, and which is meant to be made into the form of an extract suitable for consumption.

Prepared opium comprises dross and all other residues of smoked opium.

Article 6

The Contracting Powers shall take measures for the gradual and efficacious suppression of the manufacture, the internal traffic in and the use of prepared opium in so far as the different conditions peculiar to each nation shall allow of this, unless existing measures have already regulated the matter.

Article 7

The Contracting Powers shall prohibit the importation and exportation of prepared opium; however, those nations which are not yet ready to prohibit the exportation of prepared opium at once, shall prohibit such exportation as soon as possible.

Article 8

The Contracting Powers which are not yet prepared to prohibit at once the exportation of prepared opium:

*a.* shall limit the number of towns, ports or other places through which it shall be possible for prepared opium to be exported;

*b.* shall prohibit the exportation of prepared opium to the countries which now prohibit, or which shall later prohibit, the importation thereof;

*c.* shall prohibit, in the meanwhile, that any prepared opium be sent to a country which desires to limit the entry thereof, unless the exporter shall conform to the regulations of the importing country;

*d.* shall take measures to the effect that each package exported containing prepared opium shall bear a special mark indicating the nature of its contents;

*e.* shall not permit the exportation of prepared opium except through the agency of persons especially authorized.

## Chapter III

### *Medicinal opium, morphine, cocaine, etc.*

*Definitions.*—By medicinal opium shall be understood:

raw opium which shall have been heated to 60 degrees centigrade, whether or not powdered or granulated, or whether or not mixed with neutral substances, and which shall not contain less than 10% of morphine.

By morphine shall be understood:

the principal alkaloid of opium, expressed by the chemical formula $C_{17}H_{19}NO_3$.

By cocaine shall be understood:

the principal alkaloid of the leaves of Erythroxylon Coca, expressed by the formula $C_{17}H_{21}NO_4$.

By heroin shall be understood:

morphine-diacetylate, expressed by the formula $C_{21}H_{23}NO_5$.

## Article 9

The Contracting Powers shall enact pharmacy laws and regulations in such a way as to limit the manufacture, the sale, and the use of morphine, cocaine, and their respective salts to medical and legitimate uses only, unless existing laws or regulations have already regulated the matter. They shall cooperate amongst themselves in order to prevent the use of these drugs for any other purpose.

## Article 10

The Contracting Powers shall use their best efforts to control, or to cause to be controlled, all those who manufacture, import, sell, distribute, and export morphine, cocaine, and their respective salts, as well as the buildings where such persons exercise that industry or that commerce.

To this end, the Contracting Powers shall use their best efforts to adopt or to cause to be adopted

the following measures, unless existing measures have already regulated the matter:

*a.* to limit the manufacture of morphine, cocaine, and their respective salts to the premises and localities alone which shall have been authorized to this effect or to keep themselves informed as to the establishments and place where such drugs are manufactured, and to keep a register thereof;

*b.* to demand that all those who manufacture, import, sell, distribute, and export morphine, cocaine, and their respective salts shall be provided with an authorization of a license to carry on these operations, or shall make an official declaration thereof to the competent authorities.

*c.* to demand of these persons the register on their books the quantities manufactured, the importations, the sales, or any other transfer and exportations of morphine, cocaine, and their respective salts. This rule shall not apply necessarily to medical prescriptions and to sales made by duly authorized pharmacists.

## Article 11

The Contracting Powers shall take measures to prohibit in their internal commerce all transfer of morphine, cocaine, and their respective salts to all nonauthorized persons, unless existing measures have already regulated the matter.

## Article 12

The Contracting Powers, taking the differences in their conditions into account, shall use their best efforts to limit the importation of morphine, cocaine, and their respective salts, to authorized persons.

Article 13

The Contracting Powers shall use their best efforts to adopt, or cause to be adopted, measures to the end that the exportation of cocaine, morphine, and their respective salts from their countries, possessions, colonies, and leased territories to the countries, possessions, colonies, and leased territories of the other contracting powers, except in case the persons for whom the drugs are intended shall have received authorizations or permits granted in conformity with the laws or regulations of the importing country.

To this end every government may from time to time communicate to the governments of the exporting countries lists of the persons to whom authorizations or permits to import morphine, cocaine and their respective salts shall have been granted.

Article 14

The Contracting Powers shall apply the laws and regulations for the manufacture, importation, sale, or exportation of morphine, cocaine, and their respective salts:

*a.* to medicinal opium;

*b.* to all preparations (officinal and nonofficinal, including the so-called antiopium remedies) containing more than 0.2% of morphine or more than 0.1% of cocaine;

*c.* to heroin, its salts and preparations containing more than 0.1% of heroin.

*d.* to every new derivative of morphine, cocaine, or their respective salts, or to any other alkaloid of opium which might, after generally recognized

scientific investigations, give rise to similar abuse and to result in the same injurious effects.

## Chapter IV

### Article 15

The Contracting Powers having treaties with China (Treaty Powers) shall take, on concert with the Chinese Government, the measures necessary for the prevention of the smuggling, as well with respect to Chinese territory as with respect to their colonies in the Far East and the leased territories which they occupy in China, of raw and prepared opium, morphine, cocaine, and their respective salts, as well as of the substances indicated in article 14 of the present Convention. On its side the Chinese Government shall take analogous measures for the suppression of the smuggling of opium and the other substances hereinbefore indicated, from China to foreign colonies and leased territories.

### Article 16

The Chinese Government shall promulgate pharmacy laws for its subjects, regulating the sale and distribution of morphine, cocaine, and their respective salts, and of the substances indicated in article 14 of the present Convention, and shall communicate these laws to the Governments having treaties with China, through the intermediary of their diplomatic representatives at Pekin. The Contracting Powers having treaties with China shall examine these laws, and, if they find them acceptable, shall take the necessary measures to the end that they be applied to their nationals residing in China.

Article 17

The Contracting Powers having treaties with China shall undertake to adopt the measures necessary for the restraint and control of the opium-smoking habit in their leased territories, "settlements" and concessions in China, for the suppression *pari passu* with the Chinese Government of the opium divans or similar establishments which may still exist there, and for the prohibition of the use of opium in houses of amusement and of prostitution.

Article 18

The Contracting Powers having treaties with China shall take effective measures for the gradual reduction, *pari passu* with the effective measures which the Chinese Government shall take to the same end, of the number of shops, intended for the sale of raw and prepared opium, which may still exist in their leased territories, settlements, and concessions in China. They shall adopt efficacious measures for the restraint and control of the retail trade in opium in the leased territories, settlements, and concessions, unless existing measures have already regulated the matter.

Article 19

The Contracting Powers who have post offices in China shall adopt efficacious measures to prohibit the illegal importation into China, in the guise of a postal package, as well as the illegal transmission from one locality to another in China through the intermediary of these post offices, of opium, whether raw or prepared, of morphine and of cocaine and their respective salts, and of other sub-

stances indicated in article 14 of the present Convention.

## Chapter V

### Article 20

The Contracting Powers shall examine into the possibility of enacting laws or regulations making the illegal possession of raw opium, prepared opium, morphine, cocaine, and their respective salts liable to penalties, unless existing laws or regulations have already regulated the matter.

### Article 21

The Contracting Powers shall communicate to each other, through the Netherlands Ministry for Foreign Affairs:

*a.* the text of the laws and the administrative regulations in existence which concerns matters aimed at by the present convention or enacted by virtue of its clauses;

*b.* statistical information with respect to that which concerns the traffic in raw opium, prepared opium, morphine, cocaine, and their respective salts, as well as all other drugs or their salts or preparations aimed at by the present Convention.

These data shall be furnished with as much detail and in as short a time as shall be deemed possible.

## Chapter VI

### *Final provisions*

### Article 22

The Powers not represented at the Conference shall be permitted to sign the present Convention.

To this end, the Netherlands Government shall invite, immediately after the Convention shall have

been signed by the Plenipotentiaries of the Powers who have taken part in the Conference, all the Powers of Europe and of America not represented at the Conference, to wit, the Argentine Republic; Austria Hungary; Beligum; Bolivia; Brazil; Bulgaria; Chile; Colombia; Costa Rica; Republic of Cuba; Denmark; Dominican Republic; Republic of Ecuador; Spain; Greece; Guatemala; Republic of Haiti; Honduras; Luxemburg; Mexico; Montenegro; Nicaragua; Norway; Panama; Paraguay; Peru; Roumania; Salvador; Servia; Sweden; Switzerland; Turkey; Uruguay; United States of Venezuela, to designate a Delegate armed with the full powers necessary for the signing of the Convention at The Hague.

The Convention shall be furnished with these signatures by means of a "Protocol of signatures of Powers not represented at the Conference," to be added after the signatures of the Powers represented and indicating the date of each signature. The Netherlands Government shall give notice every month, to all the Signatory Powers, of each supplementary signature.

Article 23

After all the Powers, as much for themselves as for their possessions, colonies, protectorates, and leased territories, shall have signed the Convention, or the supplementary Protocol hereinbefore indicated, the Netherlands Government shall invite the Powers to ratify the Convention together with this Protocol.

In case the signature of all the Powers invited shall not have been secured by December 31, 1912, the Netherlands Government shall immediately in-

vite all the Powers who have signed by that date, to designate Delegates to proceed to the Hague to examine into the possibility of nevertheless depositing their ratifications.

Ratification shall be executed within as short a time as possible and shall be deposited at once at The Hague in the Ministry for Foreign Affairs.

The Netherlands Government shall give notice every month to the Signatory Powers of the ratifications which it shall have received in the interval.

As soon as the ratifications of all the signatory Powers, as much for themselves as for their colonies, possessions, protectorates, and leased territories, shall have been received by the Netherlands Government, this government shall give notice to all the Powers who shall have ratified the Convention, of the date on which the last of such acts of ratification shall have been received.

### Article 24

The present Convention shall go into effect three months after the date mentioned in the Netherlands Government's notification, as indicated in the last paragraph of the preceding article.

With regard to the laws, regulations, and other measures provided for by the present Convention, it is agreed that the drafts necessary to this end shall be drawn up not later than six months after the going into effect of the Convention. With regard to the laws, these shall also be proposed by the Governments to their parliaments or legislative bodies within this same period of six months, and in any case at the first session which shall follow the expiration of this period.

The date from which these laws, regulations, or measures shall go into effect shall be the subject of

an agreement between the signatory Powers, at the instance of the Netherlands Government.

In case questions shall arise relative to the ratification of the present Convention, or relative to the going into effect of the Convention, or of the laws, regulations, and measures which such Convention involves, the Netherlands Government, if these questions can not be decided by other means, shall invite all the Signatory Powers to designate delegates who shall assemble at The Hague to come to an immediate agreement on these questions.

Article 25

If it should happen that one of the Contracting Powers should wish to denounce the present Convention, such denunciation shall be notified in writing to the Netherlands Government, who shall immediately communicate a certified copy in conformity with such notification to all the other Powers, informing them at the same time as to the date on which it received such notification.

The denunciation shall have no effect except with respect to the Power who shall have given notice thereof and one year after such notice shall have reached the Netherlands Government.

In witness whereof, the Plenipotentiaries have affixed their signatures to the present Convention.

Done at The Hague, January 23, 1912, in one single copy, which shall remain deposited in the archives of the Government of the Netherlands and copies of which, certified in conformity, shall be delivered through diplomatic channels to all the Powers represented at the Conference.

[Here follow signatures.]

## Portions of a Report by the Government of the United States of America on the Traffic in Opium and Other Dangerous Drugs for the Year Ended June 30, 1926

### A. General

No new Federal laws were enacted during the fiscal year ended June 30, 1926, affecting the traffic in opium and other dangerous drugs except as noted in (3) "Internal regulation of the manufacture, sale, distribution, use, etc., of narcotic drugs." A few amendments to existing regulations were issued to improve certain details of the established system. There were no changes in the administrative arrangements.

#### REGULATION OF IMPORTS AND EXPORTS

(*a*) *Exportations.*—Exportations of narcotic drugs are by law restricted to shipments only to a country which has ratified and become a party to the International Opium Convention of 1912, and then only if (1) such country has instituted and maintains, in conformity with that convention, a system which the Federal Narcotics Control Board (consisting of the Secretaries of State, the Treasury, and Commerce) deems adequate of permits or licenses for the control of imports of such narcotic drugs; (2) the narcotic drug is consigned to an authorized permittee; and (3) there is furnished to the Federal Narcotics Control Board

proof deemed adequate by it that the narcotic drug is to be applied exclusively to medical and legitimate uses within the country to which exported, that it will not be reexported from such country, and that there is an actual shortage of and a demand for the narcotic drug for medical and legitimate uses within such country. An individual permit for each shipment is issued by the Federal Narcotics Control Board upon proper application accompanied by an import certificate issued by a duly authorized official of the country of destination covering information required under (2) and (3), as stated in the preceding sentence, fulfillment of (1) being prerequisite to the issuance of such an import certificate. American exporters continue to experience difficulty in securing import certificates from many governments which will meet the requirements of the American export law, but an improvement is noted over the year 1925.

No exportation is permitted by post. No permit is issued for the exportation of crude opium or coca leaves as such. All exporters must be properly qualified under the internal revenue law and all narcotic products exported are duly sealed with internal-revenue stamps.

(*b*) *Importations.*—Importations are by law restricted to crude opium and coca leaves, and are limited to such quantities thereof as are considered necessary by the Federal Narcotics Control Board for legitimate and medical uses only. Individual import licenses for specified quantities within such limits are issued by this board to manufacturers, properly qualified under the internal revenue law, having apparatus or equipment in use in the manufacture of derivatives of opium and coca leaves.

81004—28——5

To expedite shipment, advice of the issuance of an import permit is sent by cable to the American consul at the port of exportation upon request of the importer, and the consul will not certify the invoice until duly informed of the issuance of such a permit. All narcotic drugs arriving in the United States without due authorization are subject to seizure and confiscation. No difficulty has arisen in carrying out the requirements with respect to import licenses or permits.

(*c*) *In-transit shipments.*—In-transit shipments of smoking opium or opium prepared for smoking are forbidden by law. Other narcotic drugs may be shipped through the United States or a port thereof only upon permission of the Federal Narcotics Control Board. The general policy of this board with respect to the issuance of permits authorizing in-transit shipments is the same as that for exports; i. e., a permit for an in-transit shipment will be issued only if a permit for exportation could properly have been issued. This policy is based on the theory that this board should not permit the in-transit facilities of the United States to be used for transactions forbidden by its laws if occurring within the jurisdiction of such laws, such theory being especially supported by the fact that the same law is the authority for both the export and the in-transit permits.

* * * * *

Only a very small part of the drugs manufactured in the United States was diverted during the year 1926 to illicit channels, even less than in 1925. The established accounting, record, and inspection systems afforded adequate safeguards.

Difficulty was encountered in the attempt to eliminate the traffic in smuggled drugs.

There are still large quantities of narcotic drugs, such as morphine (chiefly morphine hydrochloride, of which comparatively little is manufactured in the United States), heroin (not manufactured in the United States), and cocaine, being unlawfully brought or smuggled into this country, particularly on the east coast, for the reason that smuggled narcotics now constitute the chief source of supply of the nonmedical addicts. Due to extensive shipping, the ease with which these drugs may be concealed, and the employment of more methodical means of smuggling, customs officers experienced difficulty in making seizures. Information acquired by enforcement officers indicated well-organized and prearranged schemes for smuggling involving illicit dealers in this country and illicit sellers in foreign countries.

* * * * *

## B. Particular Drugs

### RAW OPIUM

(*a*) Opium is not produced in the United States. All supplies thereof are imported.

(*b*) Opium may be imported only through the ports of—

Detroit, Michigan.
Indianapolis, Indiana.
New York, New York.
Philadelphia, Pennsylvania.
St. Louis, Missouri.
San Francisco, California.

During the year ended June 30, 1926, the following importations were made:

*Importations of opium from July 1, 1925, to June 30, 1926*

| Country from which exported to the United States: | Pounds (avoirdupois) |
|---|---|
| Greece | 44,959.5 |
| Turkey in Europe | 47,243.75 |
| England | 12,210 |
| Persia | 800 |
| Turkey in Asia | 2,534.25 |
| Total | 107,747.5 |

(*c*) No distinction is made among the different kinds of opium imported in so far as manufacturing purposes are concerned. During the year ended June 30, 1926, a total of 116,835.25 pounds (avoirdupois) was used in manufacturing. This embraces the production of all products of opium required of the manufacturers through legitimate trade demands. No separate record is required showing the quantities of opium used for the production of stated drugs. During the year 15,351.75 pounds (avoirdupois) of medicinal (deodorized, granulated, and powdered) opium were manufactured. Statements with respect to the manufacture of other particular drugs are hereinafter included under the proper headings.

(*d*) *Other uses.*—Opium and products thereof are used for medicinal and scientific purposes only. There are no other lawful uses in the United States.

(*e*) *Exports.*—Exportations of narcotic drugs may, when duly licensed, be made through any port of the United States. No crude opium is permitted to be exported from the United States; all exports coming under the heading of "Opium" consist of medicines containing opium and opium in deodorized, granulated, or powdered form.

* * * * *

PREPARED OPIUM

(*a*) There is little opium smoking in the United States among the (1) national or (2) alien population. Only 84 cases of violation of the smoking opium law were reported during the year; 62 persons were convicted of violation and 3 were acquitted.

Opium used for smoking purposes is smuggled chiefly along the Pacific coast and through the ports of Seattle and San Francisco. While a large part is apprehended and seized on arrival, it is believed that the traffic could be more effectively combated by employing additional means at the ports of exit to prevent placing opium aboard ships sailing for the United States.

MORPHINE

(*a*) *Imports.*—Morphine and all salts, derivatives, preparations, admixtures, etc., thereof are forbidden by law to be imported or brought into the United States.

(*b*) *Manufacture.*—Morphine is manufactured by the following companies at the locations stated:

Mallinckrodt Chemical Works, St. Louis, Missouri.
Merck & Co., Rahway, New Jersey.
New York Quinine & Chemical Works, Borough of Brooklyn, New York, New York.
Powers-Weightman-Rosengarten Co., Philadelphia, Pa.

In recording and reporting manufacturing operations the quantity of opium used in manufacturing is stated, but the drug proposed to be produced is not indicated at the time, although completely

reported when production is finished. (See part "C. Miscellaneous (14). Additional information and suggestions.") Since a total of 116,835.25 pounds (avoirdupois) of opium was used in manufacturing during the year and 15,351 pounds (avoirdupois) of deodorized, granulated, and powdered opium were produced, it follows that approximately 101,483.5 pounds (avoirdupois) were used in producing morphine, codeine, and dionin, and products thereof. The latter figure must be considered approximate only, as stated, because the quantity of crude gum opium required to produce 15,351.75 pounds of deodorized, granulated, and powdered opium, United States Pharmacopœia standard, will vary to agree with the variance between the percentage of anhydrous morphine contained in the gum opium used and the percentage required for these United States Pharmacopœia products. The United States Pharmacopœia standard for deodorized, granulated, and powdered opium is not less than 10 per cent nor more than 10.5 per cent of anhydrous morphine, and for opium not less than 9.5 per cent. The opium imported seldom contains less than this standard and frequently yields 3 to 4 per cent more. Considerable variance in the imported material is noted. Since for accounting purposes it has been found preferable not to distinguish among different forms of drug production in factories or to require different records and reports for packaging or repackaging operations, better information is to be obtained from the statistics for sales of opium products as reported by manufacturers thereof. Likewise, since little codeine is produced except from morphine, the sales of codeine, heroin,

and dionin will indicate the morphine used in the manufacture of these drugs. Products sold were manufactured either from opium used during the year or taken from stock previously produced for sale.

*Sales of opium and opium derivatives by manufacturers thereof, year ended June 30, 1926*

| | | |
|---|---|---|
| Opium (deodorized, granulated, and powdered, occasional sale of gum) | pounds (avoirdupois) | 10,920.25 |
| Morphine | ounces | 103,473 |
| Codeine | do | 136,388 |
| Heroin | do | [1] 8 |
| Dionin | do | [1] 7,992 |
| Other opium products | do | [1] 3,709 |

Practically all of the foregoing sales were made to manufacturers of pharmaceutical preparations and to wholesale dealers selling to retail druggists, physicians, hospitals, etc.; few sales of morphine, codeine, etc., are made directly by the manufacturers thereof to consumers of wholesale dealers. This is commercial practice, not the result of any requirement of law. The quantities of opium and its derivatives involved in products purchased from manufacturers of pharmaceutical preparations combined with the quantities of pure opium, morphine, codeine, etc., purchased from the manufacturers thereof, or, in other words, the total quantities of opium and opium derivatives in whatever medicinal form purchased from all manufacturers as a unit, will indicate the more immediate requirement of the population.

* * * * *

(c) *Exports.*—Very little pure morphine is exported from the United States. Practically all morphine exported is contained in pills, tablets,

[1] Manufactured prior to 1926.

preparations, mixtures, and other pharmaceutical forms. Separate statistics are available for (1) morphine and pharmaceutical products containing morphine, (2) the same for heroin, and (3) the same for dionin (ethyl morphine hydrochloride).

* * * * *

(*d*) *Legitimate home consumption.*—The Government desires to call special attention to official figures which indicate the consumption for legitimate purposes within the United States of morphine and opium. These figures do not support the widely published estimate of domestic per capita consumption made by a Government committee in 1918, at which time there was no means of obtaining accurate statistics of the nature herein reported. During the year 1926 the quantity of morphine sold by manufacturers thereof, less the quantity exported, totaled 102,845 ounces, which is probably a fair indication of the home consumption of this drug in whatever form required for legitimate purposes. In this connection it may be noted that the figure for legitimate morphine consumption during 1925, ascertained in the same manner, was 105,235 ounces. The officially estimated total population of the continental United States on June 30, 1926, was 117,136,000. The total net sale of 102,845 avoirdupois ounces of morphine is equivalent to 44,994,687.5 grains, which, divided by the population as officially estimated, would indicate an average per capita consumption for 1926 of 0.384 grain. Similarly, during 1926, a net quantity of 10,736.5 pounds of opium in medicinal form was sold for domestic use, or an equivalent of 75,155,500 grains. This figure, divided by the figure for the officially estimated population, gives 0.64 grain as

the per capita consumption of opium for 1926. Since opium is equivalent in morphine to only about 10 per cent of its weight, it follows that the per capita consumption of opium in terms of morphine is equivalent to 0.064 grain. The two figures added together give a total per capita consumption for 1926 covering opium and morphine combined of 0.448 grain or, with slight approximation, 0.45 grain. It appears unnecessary to consider other products of opium in this connection, such as codeine, dionin, narcotine, as their habit-forming effect is slight as compared with opium and morphine. Moreover, since the legitimate drug market in the United States is practically devoid of heroin, it is unnecessary further to consider that drug in determining the domestic consumption for legitimate purposes. The Government, therefore, urges all concerned to take notice of the foregoing figure and fully observe that the annual legitimate consumption in the United States of the admittedly dangerous and vicious habit-forming drugs producible from the poppy plant is less than the equivalent of one-half grain of morphine per person.

* * * * *

(*e*) The use or possession of morphine and preparations thereof for proper purposes is authorized through a system of registration of all persons or firms dealing therein commercially or professionally. The system is the same for all opium products and for coca leaves, cocaine, and preparations thereof. The internal revenue law (act of December 17, 1914, as amended) providing for the assessment and collection of annual taxes from persons so handling narcotic drugs classifies

those required to register and pay tax and defines the classes as follows:

(1) Importers, manufacturers, producers, and compounders.

(2) Wholesale dealers—persons or firms selling or offering for sale narcotic drugs and preparations in the original stamped packages, exclusive of importers, manufacturers, producers, and compounders selling or offering for sale packages of their own stamping.

(3) Retail dealers—persons or firms selling or dispensing narcotic drugs and preparations from original stamped packages; i. e., druggists filling prescriptions for narcotic drugs and preparations.

(4) Physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer narcotic drugs and preparations to patients upon whom they in the course of their professional practice are in attendance.

(5) Manufacturers, producers, compounders, and vendors of preparations and remedies not subject to tax because of low narcotic content, etc.

The importer, manufacturer, producer, or compounder attaches stamps to each package upon removal from customs custody or from his premises, as the case may be. The possession of taxable narcotic drugs or preparations by persons not required to register, unless such drugs or preparations have been obtained from a registered dealer in pursuance of a prescription issued for legitimate medical uses by a registered practitioner, the labels on the containers so to indicate, or, unless obtained directly from the attending registered practitioner for legitimate medical purposes, is

prima facie evidence of liability under the law the use by the patent is controlled by the attending practitioner, who is responsible for the use of all narcotic drugs or preparations dispensed in the case either directly or by prescription.

HEROIN

(*a*) No heroin is permitted to be imported or brought into the United States.

(*b*) Manufacturers of heroin sold 8 ounces thereof during the year ended June 30, 1926, a decrease of 5,427 ounces. (See "(14), Additional information and suggestions," under "C. Miscellaneous," for particulars concerning manufacturing processes, and part entitled "(*c*), Effect of discontinuance of manufacture of heroin.") An act was approved June 7, 1924, prohibiting the importation of opium for the purpose of manufacturing heroin. The Federal Narcotics Control Board ruled that heroin manufactured prior to June 7, 1924, was not affected by the new law, but that manufacturers must immediately cease the production of heroin from opium or morphine or other opium derivatives, even though such opium or its derivatives was imported or manufactured prior to the passage of the new act. No opium or morphine was accordingly used during 1926 for manufacturing heroin; sales reported were from stocks previously produced. It will be noted that the year 1926 marks the end of sales of heroin by manufacturers thereof.

(*c*) *Exports.*—Practically all heroin exported is part content of medicinal preparations.

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(*d*) Sales of heroin by its manufacturers for the four years 1921 to 1924, inclusive, averaged 17,400 ounces. This figure indicates the approximate annual consumption of heroin for medicinal purposes during those years was 17,000 ounces, the exports being about 400 ounces annually with the exception of 1922, when there was an aggregate exportation of 1,123 ounces. Due to the act of June 7, 1924, prohibiting the importation of opium for the purpose of manufacturing heroin, the sales of heroin for 1926 by manufacturers thereof dropped to 8 ounces. Little heroin is used for scientific purposes.

(*e*) Classes of persons to whom authority is granted for the use or possession of heroin are the same as for morphine.

MEDICINAL OPIUM

All information with respect to medicinal opium has been given under "(4) Raw opium" except the net quantity sold by manufacturers, which amounted to 10,920.25 pounds (avoirdupois). Little medicinal opium is used for scientific purposes, and all quantities consumed as medicine are in combination with other (nonnarcotic) drugs. The use and possession of medicinal opium are regulated the same as the use and possession of morphine and preparations thereof.

COCAINE

(*a*) The coca plant is not grown in the United States. Crude cocaine is not produced by manufacturers, practically all cocaine manufactured being in hydrochloride form. Very little pure cocaine is exported.

* * * * *

(*b*) Neither (1) crude cocaine, (2) refined cocaine or in salts, or (3) any preparation containing cocaine is permitted to be imported into the United States. During the year 133,053.5 pounds (avoirdupois) of crude coca leaves were imported from Peru and 129,617 pounds from Holland; total importation, 262,670.5 pounds.

(*c*) Cocaine is extracted from the leaves only in the factories of—

The Maywood Chemical Works, Maywood, New Jersey.

Merck & Co., Rahway, New Jersey.

* * * * *

(*d*) Authority for the possession and use of coca leaves, cocaine and preparations thereof is granted under the same system which is by law provided for morphine. (See "(6), Morphine," paragraph (*e*).)

OTHER DRUGS TO WHICH THE CONVENTION IS HELD TO APPLY

The Government has no report to make with respect to any other particular drug.

* * * * *

ADDITIONAL INFORMATION AND SUGGESTIONS

(*a*) *Manufacture.*—Statements made in previous reports with respect to the drug manufacturing business in the United States are repeated below, with statistical changes resulting during the year 1926.

There are four factories in which opium is used for the production of medicinal opium, alkaloids of opium, and direct and indirect products or derivatives of opium, i. e., powdered opium, granulated opium, morphine alkaloid, morphine sulphate, codeine alkaloid, codeine phosphate, ethyl morphine

hydrochloride, narcotine, etc. There are two factories in which cocaine is produced from coca leaves, one of which is one of the four concerns manufacturing opium products. There are 317 other persons or firms registered under the internal revenue law as manufacturers, producers, or compounders of taxable narcotic drugs and preparations. Some of these manufacture only one or two special medicinal preparations. Many are primarily retail druggists who manufacture for their own trade tincture of opium, Dover's powder, and other standard narcotic preparations easily compounded. The remainder constitutes the manufacturers of pharmaceutical preparations of all kinds required by pharmacies, physicians, surgeons, dentists, and hospitals. The five manufacturers of coca-leaf and opium products do not engage in the manufacture of pharmaceutical preparations. Likewise, the 317 manufacturers of pharmaceutical products do not attempt the extraction of opium alkaloids and derivatives of cocaine. This arrangement has not been required by law and is entirely a commercial development.

* * * * *

(*b*) *Imports.*—The Federal Narcotics Control Board is by law required to limit importations of crude opium and coca leaves (the only narcotic drugs which may be lawfully imported) to the quantities actually required for medical and legitimate uses only. Since the files, records, and reports required of persons authorized to purchase narcotic drugs and pharmaceutical preparations for distribution effectively restrict their use to authorized medicinal purposes, the sales made by manufacturers to persons so authorized may

properly be considered to embrace only the quantities actually needed for medicinal purposes. Because of restriction there can be no object in making excessive purchases from manufacturers, for there can be no administering or dispensing in a given case without a proven medicinal need, which need is confirmed, claimed, and authorized by the action of the attending physician, surgeon, or dentist. Manufacturers' reports, therefore, reveal the legitimate requirements. On these reports this board largely bases its limits with respect to importations of opium and coca leaves, other factors such as margins of stock necessary to proper operation of factories, margins for possible epidemics, and other legitimate requirements being given due consideration.

[Senate Document No. 377, Sixty-first Congress, second session]

## Opium Problem

Message from the President of the United States, transmitting from the Secretary of State a report on the International Opium Commission and on the opium problem as seen within the United States and its possessions, prepared by Mr. Hamilton Wright on behalf of the American delegates to the said commission, held at Shanghai in February, 1909

February 21, 1910.—Read: referred to the Committee on Foreign Relations and ordered to be printed

*To the Senate and the House of Representatives:*

I transmit herewith a communication from the Secretary of State transmitting a report on the International Opium Commission and on the opium problem as seen within the United States and its possessions, prepared by Mr. Hamilton Wright on behalf of the American delegates to the said commission, held at Shanghai in February, 1909. In reference to this report the Secretary of State makes certain recommendations regarding an appropriation and other legislative action, which I commend to the Congress with my approval and the request that action should be taken accordingly.

Wm. H. Taft.

The White House, *February 21, 1910.*

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The President:

I have the honor to transmit herewith a report by Mr. Hamilton Wright on behalf of the Ameri-

can delegates to the International Opium Commission of 1909, submitting the proceedings and resolutions of the commission, which was held at Shanghai, China, from February 1 to February 26, 1909, the American delegates being the Right Rev. Charles H. Brent, Protestant-Episcopal bishop of the Philippine Islands, Mr. Wright, and Mr. Charles D. Tenney, Chinese secretary of the American legation at Pekin; and reviewing exhaustively the opium problem as seen within the United States and its possessions.

The document sets forth and discusses the act of Congress creating the commission, and the instructions to the American delegates; the treaties and other laws internationally restricting the opium traffic; the tariff, internal revenue, and other statutes covering the trade in opium, its derivatives, and other habit-forming drugs in the United States and its possessions; the great increase in the importation of opium into the United States compared with the increase in population; the action of the United States in regard to the domestic opium problem before the assembling of the commission, resulting in the opium exclusion act of February 9, 1909, by which the importation of opium into the United States except for medicinal purposes was absolutely prohibited; the resolutions adopted by the International Opium Commission; the proposed international conference for the purpose of carrying these resolutions into an international convention; together with a tentative programme of legislation to regulate the importation, manufacture, and distribution in interstate commerce of habit-forming drugs, to impose additional internal-revenue taxation, and incidental regulation on the

81004—28——6

manufacture of smoking opium within the United States, and to extend the present pharmacy act of the District of Columbia, in substance, to the consular districts of the United States in China.

Summarizing the report as to our previous international relations and the domestic problem in regard to opium and other habit-forming drugs, it is to be observed that the opium traffic in the Far East has been steadily discountenanced by the United States through treaties made which restrict or prohibit American citizens from engaging in that traffic, and by a comparatively recent law to prevent the sale of opium and other illicit articles to the unprotected natives of certain of the Pacific Islands. On the other hand, by permitting the importation of opium prepared for smoking into this country under the dutiable schedules or at times upon the free list, this Government had for half a century unwittingly encouraged the use of this form of opium to the great detriment of Chinese immigrants and to the growing danger not only of the criminal and defective classes, but of the higher ranks of society. Incidental to the unrestricted importation of medicinal opium, the manufacture of morphia had come to be a monopoly of American manufacturers with an enormous growth in production, so that as a notorious fact large numbers of people in all social ranks had become debauched by the misuse of it. Although nearly every State in the Union, and many municipalities, had from time to time passed stringent pharmacy or police laws to control the misuse of the different forms of opium, those laws were largely ineffective because the Federal Government had made no attempt to control the importation and manufacture or distribution of

the drug in interstate commerce. A new drug problem appeared about twenty years ago, growing out of the discovery and surgical use of cocaine, which has proved to be a creator of criminals and of unusual forms of violence and has been a potent incentive in driving the primitive classes of the community all over the country to abnormal crimes. Thoughtful persons, including the importers and manufacturers of these habit-forming drugs, have reached the conclusion that the time has arrived for a strict federal control of the traffic. As a result of these facts, elicited by the preliminary investigations of the opium commission, the act of February 9, 1909, "to prohibit the importation and use of opium for other than medicinal purposes," was passed, and the regulations authorized thereby define the various terms used and enforce the purpose and intent of the law.

Expressing the view that the lack of general and uniform state laws to prohibit the manufacture as well as the use of opium prepared for smoking and the proper use of other forms of opium is a question for the urgent attention of the States, the report submits that "until uniform and effective state legislations is an accomplished fact it would seem to be the duty of the National Government to devise measures to supplement and complete the law of February 9, 1909," and thereupon proposes tentative drafts of acts to govern interstate traffic in habit-forming drugs and to tax the manufacture of smoking opium out of existence. The commission illustrate their position and recommendation by suggesting that the opium problem in the United States needs to be confined by a triangle,

one side of which has been laid down by the act prohibiting importation except for medicinal use, another side of which would be formed by the proposed act to control interstate traffic, and the third side of which would consist of an internal-revenue law placing a high tax upon the manufacture of smoking opium.

The resolutions adopted by the Shanghai commission looking to international action were unanimous and to the following effect: That the sincerity of the Government of China in its efforts to eradicate the production and consumption of opium throughout the Empire is fully recognized, and that in view of the action taken by that Government to suppress the practice of opium smoking, and by other governments to the same end, the commission recommends that each delegation move its own government to take measures for the suppression of opium smoking in its own territories and possessions; that the use of opium in any form, except for medicinal purposes, is generally held to be a matter for prohibition or careful regulation aiming at progressively increasing stringency; that it is the duty of all countries to adopt reasonable measures to prevent the shipment of opium and its derivatives at ports of departure to another country which prohibits entry; that the unrestricted sale and use of morphine constitute a grave danger, and that it is highly important for all governments to take measures to control the manufacture, sale, and distribution of this drug and of other derivatives of opium liable to similar abuse; that opium resorts in the foreign concessions or settlements in China should be closed and the trade in so-called antiopium remedies containing opium or its derivatives there-

in be prohibited; and that each government should apply its pharmacy laws to its subjects in the consular districts of China.

The countries participating in the commission besides the United States were: China, France, Germany, Great Britain, Japan, the Netherlands, Portugal, Russia, Austria-Hungary, Italy, Siam, and Persia.

No formal declaration was made by the commission as to further international action, but it was tacitly understood that a subsequent conference, with full powers, would be proposed in order to conventionalize the propositions upon which the commission agreed. Accordingly this Government has now proposed such a conference through diplomatic correspondence, and the replies already received from the interested governments give ground for the confident belief that this conference will be held at The Hague without any great delay, and that the outcome will probably be to give to the main salutary propositions of the Shanghai commission and the essential corollaries derived therefrom the force of law and international agreement. In this connection it is appropriate to say that by the act of Congress of March 3, 1905, revising and amending the tariff laws of the Philippine Islands, and under Philippine laws passed in obedience to that act, the importation of opium into the Philippine Islands in any form except for medicinal purposes is forbidden, and the use of opium except for such purposes by any person is also prohibited. It is obvious, therefore, that as respects both the United States and the Philippine Islands it is most important to obtain, if possible, an international agreement preventing or

restricting the shipment of opium from ports of export to countries prohibiting its importation.

This Government has suggested a tentative programme for the conference, not intending, however, to prescribe its scope or present proposals which might not be varied nor enlarged, but believing that its suggestions would properly serve as a basis for discussion and in aid of final action. The report states that programme (pp. 220–202) in the form of concrete propositions, which it is advisable to consider, lettered from a to n. I quote as follows from the conclusion of the report, epitomizing the policy and action of this Government:

> Thus since our Government entered the Philippines, and thereby came into direct contact with the opium problem, it has made a sustained effort not only to put its own house in order, but by inviting the powers to coordinate action raised the problem from a national to an international plane. On the latter the opium problem has been studied, discussed, and roundly condemned.
>
> In continuation of its policy our Government has invited the powers to such further cooperation as will place the production, trade in, and use of opium under the control of international law. It has been historically demonstrated that no nation working alone, that no two nations working together, are able to destroy the opium vice. It was a hopeless task. To-day as the result of the international efforts initiated by this Government the world is well on its way to see the thorough solution of not only China's

oppressive opium problem but that of other countries not so heavily burdened.

It can not be doubted, I think, that in consideration of its international relations and duties this Government is called upon to proceed with the work which it has initiated and to support and pursue the project of a conference which shall effectuate as fully as possible by international agreement the recommendations of the Shanghai commission. The interests of the Government of the United States in and its obligations to the Philippine Islands and their inhabitants forcibly emphasize this duty. No less clear appears to be the domestic duty of supplementing the restrictions upon illicit traffic in opium and other habit-forming drugs and abuse of the same contained in existing federal and state laws by additional legislation of Congress providing for enlarged control through the power over interstate commerce and the power of taxation.

I therefore have the honor to recommend:

That the accompanying report shall be transmitted by you to Congress for its information and appropriate legislative action.

That the original appropriation of $20,000 for the Shanghai commission having been exhausted now for some months, Congress should be asked to appropriate the sum of $25,000, or so much thereof as may be necessary, so that this Government may be enabled to continue its efforts to mitigate, if not entirely stamp out, the opium evil through the proposed international conference and otherwise by further investigations and proceedings.

That, without the Executive undertaking to pass upon the constitutionality or the legal advisability

of the particular measures of legislation proposed by this report, the attention of Congress should be especially drawn to that subject, in order that appropriate measures may be enacted for the suppression and control of the opium and allied evils.

And finally, that Congress should be asked by you to take steps promptly to apply and extend to our consular districts and the federal judicial jurisdiction in China the provisions of the so-called pharmacy act of the District of Columbia, with such changes as may be necessary and desirable to adapt it to those localities.

Respectfully submitted.

P. C. KNOX.

DEPARTMENT OF STATE,
*Washington, February 18, 1910.*

## Extract from Brief for United States in Alston Case

If the Court is to reexamine the *Doremus case*, it will be necessary also to examine into the operation and effect of the International Opium Convention. In *United States* v. *Jin Fuey Moy*, 241 U. S. 394, some consideration was given to that subject. The Court said that the provision in Section 2 of the original Harrison Act of 1914 was not required by the Opium Convention and that in any event the question whether the treaty gave to the Congress power to enact the provision in question respecting unlawful possession of the drug was a grave constitutional one. In that opinion the Court said (p. 401):

> If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the States obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime.

The regulations of the Federal Narcotics Control Board and the International Opium Convention

show that morphine is a derivative of opium and cocaine is a derivative of coca leaves. There is no production of either opium or coca leaves within the United States. This statement has been made repeatedly by the Government of the United States in reports doubtless prepared by the Federal Narcotics Control Board, consisting of the Secretaries of State, of the Treasury, and of Commerce. See Government Report on the Traffic in Opium and Other Dangerous Drugs for the year ending June 30, 1926, Appendix, p. 70. The reference in the statute to production therefore relates to derivatives of the imported opium or coca leaves.

Article 9 of the treaty reads:

> The Contracting Powers shall enact pharmacy laws and regulations in such a way as to limit the manufacture, the sale and the use of morphine, cocaine and their respective salts to medical and legitimate uses only, unless existing laws or regulations have already regulated the matter. They shall cooperate amongst themselves in order to prevent the use of these drugs for any other purpose.

Article 11 is as follows:

> The Contracting Powers shall take measures to prohibit in their internal commerce all transfer of morphine, cocaine, and their respective salts to all nonauthorized persons, unless existing measures have already regulated the matter.

In so far as the assailed provisions of Section 2 of the Harrison Act prevent other than registered dealers or physicians, or those obtaining

them on medical prescriptions, from purchasing or possessing the drugs, they are plainly in execution of the agreement contained in Articles 9 and 11 of the treaty. This problem can not be understood without considering, with the Harrison Act, the Narcotic Drugs Import and Export Act, and the treaty provisions.

The United States signed the Convention January 23, 1912, and July 9, 1913, and it signed a final protocol February 11, 1915. This protocol stated that as to Powers signing it after December 31, 1914, the Convention should go into effect when the protocol was signed. The Convention was proclaimed March 3, 1915. (Volume 3 of Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and other Powers, 1910 to 1923, Senate Document No. 348, 67th Cong., 4th Sess., p. 3025; Foreign Relations, 1914, p. 939; 1915, pp. 1101, 1311.)

The Narcotic Drugs Import and Export Act was enacted February 9, 1909, and amended on January 17, 1914, and again in 1922. The original Harrison Act, although enacted December 17, 1914, did not take effect by its terms until March 1, 1915, subsequent to February 11, 1915, the date when the Convention took effect and two days prior to its proclamation. It was enacted after the Convention was signed, and in prospect of its becoming operative.

In a telegram sent by the Secretary of State to delegate Henry Van Dyke June 22, 1914, while the Harrison Act was pending in Congress, it was said (Foreign Relations, 1914, p. 931):

> The hesitation of the Conference to put the Convention into effect is seriously embarrassing the passage of the fourth and

> final antinarcotic bill, now in the Senate, which was designed to carry out the terms of the Opium Convention.

The truth of the matter probably is that the original Harrison Act of December 17, 1914, the only tax imposed by it being a tax of $1 per annum on every importer, dealer, or producer, was intended not as a revenue measure but to execute the terms of the Opium Convention, and it was not until the amendments in the Revenue Act of 1918, which imposed substantial taxes on the drug and substantial occupation taxes on the four classes of persons who were authorized to deal in the drugs, that the Act became genuinely a revenue Act. As it stands to-day, it may be considered both, and the power to raise revenue and the treaty power may both be invoked in its support.

It follows that the Court may not strike down those provisions of Section 2 respecting the sale of order forms and the purchase and possession of the drug by individuals for their own use other than on medical prescriptions, without at the same time declaring that the above-quoted provisions of the treaty were void with respect to the United States. Since this subject was discussed in the first *Jin Fuey Moy case,* the Court has decided *Missouri* v. *Holland,* 252 U. S. 416, sustaining the Act enacted in 1918 to enforce the Migratory Bird Treaty. The District Court of the United States in *United States* v. *Shauver,* 214 Fed. 154, and *United States* v. *McCullagh,* 221 Fed. 288, had held that an earlier Act of Congress regulating the taking of migratory birds was an infringement of the police power of the States. This Court said of the 1918 Act (p. 432):

> If the Treaty is valid there can be no dispute about the validity of the statute under Article I, Sec. 8, as a necessary and proper means to execute the powers of the Government.

The Court further said (p. 433):

> We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

It is not contended that Congress may invade the police power of the States merely because the United States has made a treaty with a foreign nation agreeing to do so. The question in any such case is whether the treaty deals with an appropriate subject of international agreement and whether the domestic legislation, agreed to be enacted in execution of the treaty, is germane to its subject and is reasonably calculated to aid in solving the international problem to which the treaty relates. The rule with regard to the treaty power seems to be that the National Government may, by treaty, deal with any matter which is an appropriate subject of international agreement so long as it does not contravene any express prohibition in the Constitution, and that such a treaty and legislation in pur-

suance of it are the supreme law of the land, though they deal with matters which are ordinarily reserved to the States and to which the ordinary powers of Congress do not extend. That the narcotic problem is an international problem to be solved by international action, and that domestic legislation by each nation, such as was agreed upon in this Convention, is necessary to aid in solving the international problem have been, in effect, declared by the President and the Senate in the negotiation and ratification of the treaty; by Congress in enacting legislation in contemplation of its taking effect; and by high Executive officials who have dealt with and understand the problem. The particular feature of the narcotic problem, which has made international action necessary, is that the drug is handled and used in comparatively small quantities; that traffic across international boundaries is on that account difficult to suppress and regulate; that the prevention of smuggling is exceedingly difficult, and these considerations tend to justify and sustain an international agreement which relates to production, and international agreements that each nation will follow the drug to the consumer. A message from the President to the Senate on February 21, 1910, Appendix, p. 85, inclosed a report from the Secretary of State which confirms the international nature of the problem and quotes with approval a report of the Shanghai Commission of 1909, which said:

> It has been historically demonstrated that no nation working alone, that no two nations working together, are able to destroy the opium vice. It was a hopeless task. To-

day, as the result of the international efforts initiated by this Government, the world is well on its way to see the thorough solution of not only China's oppressive opium problem, but that of other countries not so heavily burdened.

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Constitutionality of Narcotic Act
Sustained

# SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1927.

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| Frank Nigro, vs. The United States of America. | On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit. |

[April 9, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case comes here by certificate of the Circuit Court of Appeals of the Eighth Circuit, and is intended to submit to us, for answer, certain questions concerning the validity and proper construction of the Anti-Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785, as amended in the Revenue Act of 1918, February 24, 1919, sec. 1006, c. 18, 40 Stat. 1057, 1130.

The Circuit Court of Appeals bases its questions on issues arising in its consideration on error of a judgment of conviction on the second count of an indictment drawn under section 2 of the Act. The count charged that one Frank Nigro and one Roy Williams unlawfully sold to one A. L. Raithel one ounce of morphine, not being sold in pursuance of a written order of A. L. Raithel on a form issued in blank for that purpose by the Commissioner of Internal Revenue. Roy Williams was not apprehended. Frank Nigro was tried and convicted and sentence was imposed of five years' imprisonment at the Leavenworth penitentiary. The Circuit Court of Appeals expressed the opinion that the case could not be disposed of without determining the construction and possibly the constitutionality of the first provision of section 2 of the Act, reading as follows:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

A summing up of the evidence, tending to show the sale of an ounce of morphine by the defendants as charged in the second count, is contained in the certificate by the Court.

The questions submitted for our consideration are as follows:

QUESTION I.

Is the provision which is contained in the first sentence of section 2 of the Act limited in its application to those persons who by section 1 are required to register and pay the tax?

QUESTION II.

If a broader construction is given to said provision, is the provision as so construed, constitutional?

If question I is answered in the affirmative, then we ask,

QUESTION III.

Is it necessary for the Government in prosecuting under said provision, to allege and prove that defendant was a person required by section I to register and pay the tax?

If question III is answered in the affirmative, then we ask,

QUESTION IV

Is the allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, sufficient to charge that defendant was a person required to be registered and to pay the tax under section I?

The second question was invoked by what we said in *United States* v. *Daugherty*, 269 U. S. 360, 362, as follows:

"The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus*, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44, 67; and *Linder* v. *United States*, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

In *Alston* v. *United States*, 274 U. S. 289, 294, the question of the constitutionality of the act was sought to be presented, but the case only involved the validity of section 1 as amended in the Revenue Act of 1918. We held that section valid because it imposed a stamp tax on certain narcotic drugs, making it unlawful to purchase or sell them except in or from original stamped packages, which was plainly within the taxing power of Congress and had no necessary connection with any other requirement of the act which might subject it to reasonable question. We said that section 1 did not absolutely prohibit buying or selling; that it produced a substantial revenue and contained nothing to indicate that by colorable use of taxation Congress was attempting to invade the reserved powers of the States.

The present case relates to the validity of the second section of the law; but, before considering this, we must answer the first question and construe the meaning of the first sentence of section 2 quoted above. The controversy is whether the words "any person" in that sentence include all persons or apply only to persons who are required to register and pay the tax under the first section of the act.

We have put in the margin* a synopsis of the original section 1 of the Act of 1914, and of the same section as amended in the Reve-

*The original first section required every person who produced, sold, or gave away opium or coca leaves or any preparation thereof, to register with the proper internal revenue collector his name and place of business and to pay a special tax of a dollar a year, provided that no employee of such person need either register or pay, nor were officers, of the General Government or of State or county or municipal governments lawfully engaged in purchasing the drugs for hospitals or prisons required to do so.

It was also provided that: "It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section." The section provided that the word "person" used in the Act should be construed to mean and include a partnership, association or corporation as well as a natural person.

By the Revenue Act of 1918, this first part of section one is made to read as follows: "That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue, of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided." A special tax is then imposed on importers, manufacturers, producers or compounders of the drugs of $24.00 per annum, on wholesale dealers, $12.00, on retail dealers, $6.00, and on physicians entitled to administer the drugs in their professional practice, $3.00. Employees of all lawfully registered persons are exempted from tax. It is then provided that: "It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section". Then an excise revenue tax of one cent per ounce on the drug is imposed through stamps to be affixed to the bottle or other container. It is made unlawful to sell or dispense the drugs except in or from the original stamped package and possession of the drug by any person is made prima facie evidence of violation of the section. Possession of an original stamped package containing

nue Act of 1918, and of some other sections now in force, including section 2.

In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid, just as the Child Labor Act of Congress was held to be, in *Bailey, Collector* v. *Drexel Furniture Company*, 259 U. S. 20. Everything in the construction of section 2 must be regarded as directed toward the collection of the taxes imposed in section 1 and the prevention of evasion by persons subject to the tax. If the words can not be read as reasonably serving such a purpose, section 2 can not be supported.

The importation, preparation and sale of the opiate or other like drugs and their transportation and concealment in small packages

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the drug is made prima facie evidence of liability to pay the tax. These presumptions are not to apply to a person obtaining the drug from a registered dealer in pursuance of a prescription written for legitimate medical uses issued by a physician or other registered practitioner and where the bottle or other container in which the drug is put up by the dealer bears the druggist's name, his serial and registry number, the number, name and address of the patient, as well as those of the writer of the prescription. The presumptions are not to apply to the dispensing of the drug to a patient by a registered physician, or practitioner in the course of his professional practice for legitimate medical purposes where a record is kept. All the provisions of existing law relating to the engraving, sale and cancellation of tax paid stamps provided for in the internal revenue laws are made to apply to the stamps issued under the section. Unstamped packages found in possession of any person except as provided in the section are subject to seizure. Importers, manufacturers and wholesale dealers are to keep books and records and render monthly returns in relation to dealing with such drugs as are required by regulation made by the Commissioner and approved by the Secretary of the Treasury.

Section 2 of the Act of 1914 was not changed by the Revenue Act of 1918. This section provides: "That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof, shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in sec-

are exceedingly easy and make the levy and collection of a tax thereon correspondingly difficult. More than this, use of the drug for other than medicinal purposes leads to addiction and causes the addicts to resort to so much cunning, deceit and concealment in the procurement and custody of the drug and to be willing to pay such high prices for it that, to be efficient, a law for taxing it needs to make thorough provision for preventing and discovering evasion of the tax—as by requiring that sales, purchases and other transactions in the drug be so conducted and evidenced that any dealing in it where the tax has not been paid may be detected and punished and that opportunity for successful evasion may be lessened as far as may be possible.

The literal meaning of "any person", in the first line of the first sentence of section 2, includes all persons within the jurisdiction. The word "persons" is given expressly the meaning of a

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tion five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned." But section 2 is not to apply

1. to dispensing by a registered physician in the course of his professional practice only if he keep a record of all his dispensing except what he dispenses in personal attendance upon a patient.
2. or to dispensing of the drug to a consumer by a registered dealer on written prescription of a registered physician if dated on the day it is signed, the dealer to keep record of such prescriptions for inspection.
3. or to sale, exportation, shipment or delivery of the drug by any person within the country for exportation under regulations.
4. or to sale or giving away any of the drug to any officer of the National Government or State, county or municipality lawfully engaged in making purchases for hospitals or prisons.

The Commissioner of Internal Revenue with the approval of the Secretary of the Treasury is to cause suitable forms to be prepared for the purposes mentioned to be distributed to the collectors of internal revenue for sale by them to persons who have registered and paid the special tax, and no collector is to sell any forms except to such persons. The price of these forms is to be fixed by the Commissioner of Internal Revenue as approved by the Secretary of the Treasury, but is not to exceed one dollar per hundred. When a collector shall sell forms he is to cause the name of the purchaser to be plainly written or stamped on them before sale and delivery and no person other than such purchaser shall use the forms so stamped to procure delivery on shipment of

partnership, association or corporation, as well as that of a natural person. Why should it not be given its ordinary comprehensive significance? The argument to the contrary in favor of limiting it to exclude all but those who are required to register and pay the tax is that it would be superfluous to include persons selling opium who are not registered, because they are denounced as criminals by the first section for selling without registration. That is no reason why they may not be included under a second reasonable restriction enforceable by punishment. Of course such a restriction should be fairly adapted to obstruct the successful accomplishment of the main crime or furnish means of detecting the guilty person, and not be a fruitless, useless inhibition only resulting in what is in effect a duplication of punishment for substantially the

any such drug. It is made unlawful to obtain by means of such forms any such drug for use, sale or distribution of it except in the conduct of a lawful business in the drug or in the legitimate practice of a medical profession.

The third section provides for returns and records to be made by registered persons.

The fourth section makes it unlawful for any non-registered person who has not paid the tax to send, ship, or deliver to any person in another state, except common carriers and employees of registered persons.

Section 5 provides for official inspection of orders, prescriptions, etc., and forbids a disclosure of information except for the enforcement of the act.

Section 6 of the original Act was amended by the Revenue Act of 1918 and relates to minimum limitations upon strength of opium and other drugs to come within statute, but dealers in preparations that are less than minimum are to keep a record of the sale of such for inspection.

By section 7, internal revenue laws as to assessment collection, remission and refund of internal revenue taxes are made applicable to taxes under the act so far as not inconsistent.

By section 8, it is made unlawful "for any person not registered" under the Act, and who has not paid the special tax, to have in his possession or under his control such drugs and his thus having them shall be presumptive evidence of a violation of this section, with the usual exemptions of employees of registered persons, and of government officers having such possession for their official duties. The section directs that the exemptions need not be negatived in an information or indictment and that the burden of proof is to be upon person claiming exemption.

Section 9 subjects any one violating or failing to comply with the requirements of the Act to a fine of not more than $2,000 or imprisonment not more than five years or both.

Section 10 authorizes appointment of agents and others necessary to enforce provisions of the Act and

Section 11 makes appropriation for carrying out the Act.

same crime, as in the case of *United States* v. *Katz*, 271 U. S. 354, 362.

It would seem to be admissible and wise in a law seeking to impose taxes for the sale of an elusive subject to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, any departure from the steps enjoined may be punished, and added penalties may be fixed for successive omissions, but all for the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax.

The reasonableness of such requirements is well illustrated in the many limitations which were imposed upon the ancient freedom in the making and sale of distilled spirits to the end that the collection of the heavy tax on the subject matter might be successfully secured in spite of the temptation to avoid the tax. The provision of section 2 making it an offense to sell unless the purchaser gives a particular official form of order to the seller was enacted with a like object. The sale without such an order thus carries its illegality on its face. Its absence dispenses with the necessity of sending to examine the list of those registered to learn whether the seller is engaged in a legal sale. The requirement that the official forms can only be bought and obtained by one entitled to buy, whose name shall be stamped on the order form, and that after the sale the order form shall be recorded, effects a kind of registration of lawful purchasers, in addition to one of lawful sellers, and keeps selling and buying on a plane where evasion of the tax will be difficult.

There are persons who may lawfully have access to or even custody of the drugs without registration. Thus included among such persons are the employees of those who have registered and paid the tax. If they were to attempt to sell such drugs the necessity for an order form from the would-be purchaser would embarrass the illegal sale, for the participants would hesitate to make a record of the transaction. Thus the operation of section 2 in preventing an individual not a registered dealer or physician from acquiring the drug other than by an order form or a prescription is directly related to tax enforcement, because such drugs are not necessarily consumed by the purchaser but may be peddled or sold illegally. These order form provisions constitute a needed check on illegal sales and they are distinctly helpful in the detection of an attempted dealing in, or selling of, the drug free from the tax.

Section 2 of the act is the same as it was when originally passed in 1914. The construction put upon it before the amendment of section 1, by the Revenue Act of 1918, must be the same now as before. Under section 1 in the original Act, the only provision to keep track of purchasers was the order form provision of section 2, as it is now. Without it, unless it applied to those not required to register or pay the tax, there was no restriction upon such persons whether illegal sellers or illegal purchasers in the disposition and spread of the drug, except the simple punishment for unregistered sellers in the first section, and there was entire immunity from order requirements of the purchasers from illegal sales. We can not suppose that, considering the general language of section 2, any such result was intended by Congress.

By the amendment of section 1, much higher occupation taxes were imposed and they vary in amount for producers and manufacturers and for wholesale and retail dealers and for physicians. More than that, an excise tax of one cent per ounce of the drug is imposed and payment thereof is to be evidenced by stamps attached to the bottle or box containing the drug, and the sale of the drug from anything but a stamped bottle or container is punishable. The provision for order forms is thus useful under the amended section, and there is therefore still reason for holding the provisions of section 2 to apply to all persons so as to be helpful in promoting detection of evasion from the added tax imposed under the new section 1. The two tax provisions of that section would be much less effective if a purchaser of drugs from an unregistered dealer is not required to furnish an order form. The purchaser may be himself one who should register, but has not done so, or he may be dealing in and selling the drug on which the stamp tax has not been paid and it is just as important that sales by an unregistered dealer should be punished unless made on a prescribed form as that sales by registered dealers should be subject to penalty.

There is nothing in the language of the section itself that would reduce the significance of the words "any person" from the meaning of "all persons" to that of those persons only who are required to register and pay the tax as there was in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, upon which the appellant relies much. In that case, the defendant was indicted for conspiring to get morphine into the possession of an unregistered person for use by him as an addict and not for medical purposes. The

question was whether the possession conspired for was within section 8 of the act declaring it unlawful for any person who was not registered and had not paid the special tax to have the drug in his possession. It was held that section 8 applied only to persons required to register under section 1 and pay the occupation tax. The language of section 8 is more restricted than section 2. It reads: "That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs". The words "any person" in section 2 are not linked with those who have not registered and have not paid the tax, but ought to do so, as are the same words in section 8. The narrow construction of section 8 in the *Jin Fuey Moy* case was reached in part certainly because of the juxtaposition of the words. This is shown by a more recent decision of this Court in *United States* v. *Wong Sing*, 260 U. S. 18. In that case, *Wong Sing* was indicted under the amendment, section 1006 of the Revenue Act of 1918, for purchasing the drug not from an original stamped package and not from a person who was a registered dealer. It was objected that under the *Jin Fuey Moy* case, a person to be criminally liable under section 1006 must be of a class who must register and pay taxes, but it was held that that section was not limited, as section 8 was held to be.

In *Fyke* v. *United States*, 254 Fed. 225, the Circuit Court of Appeals for the Fifth Circuit decided that the proper construction of section 2 under the original Act of 1914 made it applicable to sales by any person whether registered or not. Speaking of the Act as it was before 1918, the Court said:

"All sellers were members of the class required to register and pay the tax, under section 1, and the revenue derived from sellers, as provided for by that section, could manifestly not be collected unless Congress had the power to, and did in fact, punish the sale of the prohibited drugs by all persons except when made in conformity to the act. The necessity of prohibiting sales by unregistered persons and of sales by registered persons, not complying with the act, were of equal importance. If only the latter class were subject to its penalties, all persons, by failing to register, could sell with impunity, without paying the tax or complying with the other requirements of the act.

"Section 1 punishes sales by persons who have neither registered nor paid the tax. Section 2 punishes persons who sell, not in pursuance of a written order of the person to whom the sale is

made. The language of section 2 is general, and does not restrict the prohibition to registered sellers in terms. Indeed, the exception, lettered 'd', applies to a class expressly excepted from registry and payment of the tax by section 1. This exception would seem to be superfluous, if section 2 applied only to registered persons, since the excepted class would not then be included in the class against whom the penalties of the section are directed."

The exception "d" here referred to is that which requires no order form to be used by officers of the National, state, county and municipal governments, in purchases for certain governmental uses, and which would indicate that such officers, who are not required to register, would, but for this exception, be covered by section 2.

The Circuit Court of Appeals of the Ninth Circuit, in *Coleman* v. *United States*, 3 Fed. (2d) 243, expressly found that the first provision of section 2 was not intended to be limited in its application to the persons required to register under section 1.

*United States* v. *Katz*, 271 U. S. 354, is said to be in conflict with our view of the question before us. We do not think so. Defendants there were indicted for a conspiracy to sell intoxicating liquors, without making a permanent record of the sale, in violation of section 10, Title II, of the National Prohibition Act. That section provided that no person should make, sell or transport intoxicating liquor without making a permanent record of it, showing in detail the amount and kind of liquor dealt with, the names of persons with whom dealt, and the time and place of such dealing. The form of the records was to be prescribed by the Commissioner and to be open to inspection by him, his agent, or any peace officer of the State. The defendants contended that the section applied only to those who under the Act were authorized to sell liquor under a permit. The United States contended that the section in its general negation applied to any violator of the Act. We held with the defendants that such a construction of section 10 imputed to Congress an improbable incongruity in wishing to add to the crime of making, selling or transporting liquor a second offense if the person committing it should fail to make a record of his own wrong doing. It was pointed out that Congress had before it the previous revenue acts governing distillers, rectifiers and brewers, requiring detailed records of all transactions which were lawfully subject to governmental regulation as a condition of granting permits, and that when Congress came to the Prohibition Act

it adopted the same system of permits, and the parliamentary history of the section 10 showed that to secure records from its permittees was its only purpose in that section. The *Katz* case was really, therefore, decided because of the incongruity that would result in an interpretation of section 10 as claimed by the Government. Here there is really no such incongruity.

Section 2 of the Anti-Narcotic Act introduces into the Act the feature of the required and stamped order form to accompany each sale. It is to bear the name of the purchaser, and is addressed to the seller, with other data. Recorded as the law requires it to be, it constitutes a registry of purchasers, as distinguished from that of sellers. Congress intended not only to punish sales without registration under the first section, but also to punish them without order forms from the purchaser to the seller, as a means of making it difficult for the unregistered seller to carry through his unlawful sales to those who could not get order forms. Thus an illegal unregistered seller might wish to clothe his actual unregistered sales with order forms that would give the transaction a specious appearance of legality. To punish him for this misuse of an order form is not to punish him for not recording his own crime. It is to punish him for an added crime—that of deceiving others into the belief that the sale is a lawful sale. There is no incongruity in increasing the criminal liability of the non-registered seller who fails to use an order form in his sales, or who misuses it. Both the registered and the non-registered seller are, under our construction of the section, punished for not using the order forms as the statute requires, or for misusing them. The order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on, or else it is a means of discovering the illegality and is useful for the latter purpose. We think the resemblance of the *Katz* case and this case is superficial and that they are distinguishable.

We are of opinion, therefore, that the provision which is contained in the first sentence of section 2 of the Act is not limited in its application to those persons who by section 1 are required to register and pay the tax. We answer the first question in the negative.

This brings us to the second question, which is ". . . is the provision as so construed, constitutional?" It was held to be constitutional in *United States* v. *Doremus*, 249 U. S. 86, 94. In

that case the validity of the Anti-Narcotic Drug Act as it was enacted December 17, 1914, 38 Stat. 785, was under examination by this Court. The inquiry was whether section 2, in making sales of the drugs unlawful except to persons giving orders on forms issued by the Commissioner of Internal Revenue, to be preserved for official inspection, and forbidding any person to obtain the drugs by means of such order forms for any other purpose than use, sale or distribution in the conduct of a lawful business, or in the legitimate practice of his profession, bore a reasonable relation to the enforcement of the tax provided by section 1 and did not exceed the power of Congress. It was held that section 2 aimed to confine sales to registered dealers and to those dispensing the drugs as physicians and to those who come to dealers with legitimate prescriptions of physicians; that Congress, with full power over the subject, inserted these provisions in an Act specifically providing for the raising of revenue. Considered of themselves, the Court thought that they tended to keep the traffic above board and subject to inspection by those authorized to collect the revenue; that they tended to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This Court said in the *Doremus* case:

"This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue".

Referring to the same section 2, in *United States* v. *Balint*, 258 U. S. 250, 253; this Court said:

"It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic".

Four members of the Court dissented in the *Doremus* case, because of opinion that the court below had correctly held the Act of Congress, in so far as it embraced the matters complained of, to

be beyond its constitutional power and that the statute, in section 2, was a mere pretext as a tax measure and was in fact an attempt by Congress to exercise the police power reserved to the states and to regulate and restrict the sale and distribution of dangerous and noxious narcotic drugs. Since that time, this Court has held that Congress by merely calling an act a taxing act can not make it a legitimate exercise of taxing power under section 8 of Article I of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise. *Child Labor Tax Case*, 259 U. S. 20, 38. By the Revenue Act of 1918, the Anti-Narcotic Act was amended so as to increase the taxes under section 1, making an occupation tax for a producer of narcotic drugs $24. a year, for a wholesale dealer $12, for a retail dealer, $6.00, and for a physician administering the narcotic, $3.00. The amendment also imposes an excise tax of one cent an ounce on the sale of the drug. Thus the income from the tax for the Government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this act as an alleged subterfuge, it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the *Alston case*.

It may be true that the provisions of the act forbidding all but registered dealers to obtain the order forms has the incidental effect of making it more difficult for the drug to reach those who have a normal and legitimate use for it, by requirement of purchase through order forms or by physicians prescription. But this effect, due to the machinery of the act, should not render the order form provisions void as an infringement on state police power where these provisions are genuinely calculated to sustain the revenue features. The section 2 was once sustained by this Court some nine years ago with more formidable reason against it than now exists under the amended statute. Its provisions have been enforced for those years. Whatever doubts may have existed respecting the order form provisions of the act have been removed by the amendment made in 1919.

We said in the *Child Labor Tax Case* (259 U. S. 20, 38):

"Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining

revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive".

In this case, the qualification of the right of a resident of a state to buy and consume opium or other narcotic without restraint by the Federal Government is subject to the power of Congress to lay a tax by way of excise on its sale. Congress does not exceed its power if the object is laying a tax and the interference with lawful purchasers and users of the drug is reasonably adapted to securing the payment of the tax. Nor does it render such qualification or interference with the original state right an invasion of it because it may incidentally discourage some in the harmful use of the thing taxed. *License Tax Cases*, 5 Wall. 462; *Nicol* v. *Ames*, 173 U. S. 509, 524; *Knowlton* v. *Moore*, 178 U. S. 41, 60, 61; *In re Kollock*, 165 U. S. 526, 536.

This leads to an answer to the second question in the affirmative, and makes it unnecessary for us to answer the remaining third and fourth questions.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1927.

Frank Nigro, *vs.* The United States of America. } On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 9, 1928.]

The separate opinion of Mr. Justice McReynolds.

Nigro, not alleged to be registered as a dealer, was charged with violating Sec. 2 of the Harrison Anti-Narcotic Act by selling opium (whether in or from an original stamped package does not appear) to Raithel, not a dealer, without an order upon a form issued by the Commissioner of Internal Revenue.

It is maintained, first, that Sec. 2 applies to all sales, including, of course, those made by one who is not registered to a purchaser who cannot possibly secure an order form; and, secondly, that so construed, is constitutional. Both propositions, I think, are wrong.

Sec. 1 of the Act imposes a definite tax (uniform for each class) upon "every person" who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium; also a stamp tax of one cent per ounce upon the drug. All who are subject to the tax are required to register; and the section further provides—

> "It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section."

Sec. 2 declares—

> "That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs [opium, &c.] except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. . . .

> "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; . . ."

Obviously, no one who has not registered and paid the special tax laid by Sec. 1 can obtain "suitable forms."

Fair application of the principles of construction approved in *United States* v. *Palmer,* 3 Wheaton 610; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, and *United States* v. *Katz,* 271 U. S. 354, should at least limit the words "any person" in the first line of Sec. 2 to those required to register by Sec. 1, which renders unlawful every sale by an unregistered person, whether the purchaser possesses an order blank or no. And it seems unreasonable to conclude that the purpose of the next section was awkwardly to state something already plainly declared.

The sale by Nigro was to one who could not obtain an order blank. Only a small group—importers, manufacturers, dealers, etc.—can obtain these blanks. As construed by the United States, the statute prohibits all sales except to those who are registered or hold physicians' prescriptions—no others can buy lawfully. Admittedly, the statute is valid only as a revenue measure. Any provision therein not appropriate to that end is beyond the power of Congress.

I can discover no adequate ground for thinking Congress could have supposed that collection of the prescribed tax would be materially aided by requiring those who engage in selling surreptitiously to consumers to do an impossible thing—receive an order upon a blank which the purchaser could not obtain. The plain intent is to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions, and this amounts to an attempted regulation of something reserved to the States. The questioned inhibition of sales has no just relation to the collection of the tax laid on dealers. The suggestion to the contrary is fanciful. Although disguised, the real and primary purpose is not difficult to discover and it is strict limitation and regulation of the traffic.

Whether, or how far, opium, tobacco, diamonds, silk, etc., may be sold within their borders is primarily for the States to decide;

the Federal Government may not undertake direct regulation of such matters.

This Court said in *United States* v. *Wong Sing,* 260 U. S. 18, 21 —"There could be no object in requiring a purchaser of the drugs to register but it fulfilled the purpose of the law to forbid a purchase 'except in the original stamped package or from the original stamped package.' "

The habit of smoking tobacco is often deleterious. Many think it ought to be suppressed. The craving for diamonds leads to extravagance and frequently to crime. Silks are luxuries and their use abridges the demand for cotton and wool. Those who sell tobacco, or diamonds, or silks may be taxed by the United States. But, surely, a provision in an act laying such a tax which limited sales of cigars, cigarettes, jewels, or silks to some small class alone authorized to secure official blanks would not be proper or necessary in order to enforce collection. The acceptance of such a doctrine would bring many purely local matters within the potential control of the Federal Government. The admitted evils incident to the use of opium cannot justify disregard of the powers "reserved to the States respectively, or to the people."

Mr. Justice SUTHERLAND concurs in these views.

# SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1927.

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| Frank Nigro, Petitioner, *vs.* The United States of America. | On Certificate from the Circuit Court of Appeals for the Eighth Circuit. |

[April 9, 1928.]

Mr. Justice Butler, dissenting.

Section 1 was originally enacted December 17, 1914, c. 1, 38 Stat. 785. It was amended by the Revenue Act of 1918 passed February 24, 1919, § 1006, c. 18, 40 Stat. 1057, 1130. It contains the following: "It shall be unlawful for any person required to register under the provisions of this Act to . . sell . . any of the aforesaid drugs without having registered and paid the special tax as imposed by this section."

Section 2 appeared in its present form in the original Act. The pertinent provision is: "It shall be unlawful for any person to sell . . any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold . . on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue." 38 Stat. 786.

The effect of these two provisions is to prohibit sale by any person who has not registered and to permit sale by a registered person upon a written blank issued by the Commissioner. That conclusion is so plain that discussion cannot affect it.

*Question 1 should be answered Yes.*
*Question 2 need not be answered.*
*Question 3 should be answered Yes.*
*Question 4 should be answered No.*

Mr. Justice Sutherland concurs in this opinion.